Supreme Court, U.S.
FILED

No. 04-1094 FEB 11 2005

OFFICE OF THE CLERK

In The

Supreme Court of the United States

CECILIO NUÑEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF *CERTIORARI*

NEIL M. SCHUSTER, P.A.
555 N.E. 15 Street, Suite 2C
Miami, FL 33132
Tel: (305) 416-0324/Fax: (305) 416-0325
Email: nmschus@bellsouth.net
Florida Bar No. 216909
Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

I.

Should this Court require uniform application of *United States v. Booker*, 2005 WL 50108 (U.S.), *Blakely v. Washington*, 124 S. Ct. 2531 (2004) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000) to all cases presently on direct appeal and enforce adherence to that portion of its precedent in *Schriro v. Summerlin*, 124 S. Ct. 2519, 2523 (2004); *Griffith v. Kentucky*, 479 U.S. 314, 322-23 (1987), and *United States v. Johnson*, 457 U.S. 537 (1982), which requires that law changing decisions must apply to all cases presently on direct appeal such that remand by this Court for resentencing will be mandated even if the issue was not anticipated in the briefing below. Alternatively, should the singular Circuit Court doing otherwise with regard to law changing decisions, see *United States v. Levy*, 391 F.3d 1327 (11th Cir. 2004) (*en banc*) and *United States v. Neeley*, 232 F.3d 825, 830-31 (11th Cir. 2000), be required to apply this Court's new interpretation of the Federal Sentencing Guideline regime in all direct appeals whether or not the issue was raised in the initial briefs.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	1
CONSTITUTIONAL, STATUTORY, PROVISIONS, AND GOVERNING SENTENCING GUIDELINES	1
STATEMENT OF THE FACTS	2
A. Course of Proceedings and Disposition in the Court Below	2
1. Indictment	2
2. Federal Sentencing Guideline Presentence Investigation Report (PSR)	4
3. Sentencing on September 11, 2002 (DE 109)	7
REASONS FOR GRANTING THE WRIT	8
I. Preface	8
II. Certiorari review should be granted to ensure that defendants on direct appeal within the United States Court of Appeals for the Eleventh Circuit are not excluded from the benefit of law changing decisions of this Court rendered subsequent to filing their opening briefs	11

TABLE OF CONTENTS – Continued

Page

a. The Eleventh Circuit decision in *Levy* is contradictory to a long line of Supreme Court Cases..... 11

b. The Eleventh Circuit decision in *Levy* directly contradicts every other Circuit 16

CONCLUSION..... 23

TABLE OF AUTHORITIES

Page

SUPREME COURT CASES

Apprendi v. New Jersey, 530 U.S. 466 (2000) ..... *passim*

Blakely v. Washington, 124 S. Ct. 2531 (2004) ..... *passim*

Glover v. United States, 531 U.S. 198 (2001) 10

Griffith v. Kentucky, 479 U.S. 314 (1987) ... 11, 12, 15, 16, 23

Schriro v. Summerlin, 124 S. Ct. 2519 (2004) 11, 15, 16, 23

United States v. Booker, 2005 WL 50108 (U.S.) ..... *passim*

United States v. Johnson, 457 U.S. 456 (1982) ..... *passim*

LOWER COURT CASES

Mackey v. United States, 401 U.S. 677 (1971) 14

United States v. Ameline, 376 F.3d 967 (9th Cir. 2004) 18, 19, 22

United States v. Ardley, 273 F.2d 991 (11th Cir. 2001), *cert. denied, Ardley v. United States*, 535 U.S. 979 (2002) 11

United States v. Babiar, 390 F.3d 598 (8th Cir. 2004) 20

United States v. Badilla, 383 F.3d 1137 (10th Cir. 2004) 19

United States v. Byers, 740 F.2d 1104 (D.C. Cir. 1984) 20, 21

United States v. Campos-Martinez, 976 F.2d 589 (9th Cir. 1992) 23

United States v. Cordoza-Estrada, 385 F.3d 56 (1st Cir. 2004) 19

TABLE OF AUTHORITIES – Continued

Page

United States v. Coyne, 114 Fed. Appx. 5 (1st Cir. 2004) 21

United States v. Duncan, 381 F.3d 1070 (11th Cir. 2004) 16, 21

United States v. Flores-Payon, 942 F.2d 556 (9th Cir. 1991) 23

United States v. Glenn, 389 F.3d 283 (1st Cir. 2004) 18

United States v. Griffith, 385 F.3d 124 (2d Cir. 2004) 19

United States v. Henningsen, 387 F.3d 585 (7th Cir. 2004) 17, 18

United States v. Hughes, 2005 WL 147059 (4th Cir. January 24, 2005) 18

United States v. Kinter, 235 F.3d 192 (4th Cir. 2000) 22

United States v. Levy, 391 F.3d 1327 (11th Cir. 2004) 11, 12, 20

United States v. Miranda, 248 F.3d 434 (5th Cir. 2001) 17

United States v. Moore, 109 Fed. Appx. 503 (3d Cir. 2004) (unpublished op.) 19

United States v. Musleh, 106 Fed. Appx. 850, 2004 WL 1858247 (4th Cir. 2004) (unpublished op.) 19

United States v. Nealy, 232 F.3d 825 (11th Cir. 2000) 16

United States v. Pepsny, 108 Fed. Appx. 713, 2004 WL 1873996 (3d Cir. 2004) (unpublished op.) 19

United States v. Perez-Covarrubias, 983 F.2d 1079 (9th Cir. 1993) (Table Decision) 23

TABLE OF AUTHORITIES – Continued

Page

United States v. Pierce, 388 F.3d 1136 (8th Cir. 2004) 20

United States v. Pirani, 2004 U.S. App. LEXIS 16117 (8th Cir. Aug. 5, 2004) 20

United States v. Poulack, 236 F.3d 932 (8th Cir. 2001) 20

United States v. Pree, 384 F.3d 378 (7th Cir. 2004) 17, 18, 19

United States v. Rogers, 118 F.3d 466 (6th Cir. 1997) 16, 17

United States v. Sanchez, 269 F.3d 1250 (11th Cir. 2001) 21, 24

United States v. Satterfield, 2004 WL 2491574 (4th Cir. Nov. 5, 2004) (unpublished op.) 18

United States v. Stearns, 387 F.3d 104 (1st Cir. 2004) 18, 21, 22

United States v. Westover, 107 Fed. Appx. 840, 2004 WL 1790016 (10th Cir. 2004) 19

CONSTITUTION

U.S. Const. amend. V 1

U.S. Const. amend. VI 1

STATUTES

21 U.S.C § 841 3

21 U.S.C § 846 3

28 U.S.C § 1254 1

U.S.S.G. § 2B3.1 ..... 1, 5, 6

TABLE OF AUTHORITIES – Continued

Page

U.S.S.G. § 3A1.1 1
U.S.S.G. § 3A1.11(b)(1) 7
U.S.S.G. § 3B1.3 ..... 2, 5, 6, 7
U.S.S.G. § 3D1.1 ..... 2, 5, 7

OPINIONS BELOW

The first opinion of the United States Court of Appeals for the Eleventh Circuit is reprinted at Pet. App. 3. The *per curiam* order affirming the sentencing after remand is reproduced at Pet. App. 2.

The appellate court affirmed the sentence after ruling the trial court correctly denied Petitioner's new trial motion notwithstanding numerous errors of law in the manner of which it reviewed the Rule 33 petition.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eleventh Circuit issued an order denying relief on August 26, 2004. Pet. App. 2. Thereafter, Petitioner, *pro se,* filed for Petition for Rehearing and Suggestion for Rehearing *en banc*. Petition for Rehearing and Suggestion for Rehearing *en banc* was denied by way of Order dated November 19, 2004. Pet. App. 1. This Petition is filed within ninety days of the denial of Petition for Rehearing and Suggestion for Rehearing *en banc*. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL, STATUTORY, PROVISIONS, AND GOVERNING SENTENCING GUIDELINES

Amendment V to the Constitution of the United States

Amendment VI to the Constitution of the United States

U.S.S.G. § 2B3.1

U.S.S.G. § 3A1.1

U.S.S.G. § 3B1.3

U.S.S.G. § 3D1.2

STATEMENT OF THE FACTS

A. Course of proceedings and disposition in the court below.

1. Indictment.

On October 26, 2001, the appellant, Cecilio Nuñez (hereinafter "Nuñez"), a former City of Hialeah Police Officer, along with original co-defendant Orestes DeSoto (hereinafter "DeSoto"), also a former City of Hialeah Police Officer, was charged in seven counts of an eight-count indictment returned in the Southern District of Florida. (DE 17.) The charges in the indictment are:

> Count 1 charged DeSoto and Nuñez with conspiring to possess with intent to distribute five or more kilograms of cocaine between January 2000 and May 2001, in violation of 21 U.S.C. §§ 841(a)(1) and 846;
>
> Count 2 charged DeSoto and Nuñez with conspiring to violate the "Hobbs Act" through the commission of robberies, in violation of 18 U.S.C. § 1951(a);
>
> Count 3 charged DeSoto and Nuñez with conspiring to carry a firearm during a crime of violence and drug trafficking crimes between January 2000 and May 2001, as alleged in the other counts of the indictment, in violation of 18 U.S.C. §§ 924(c) and (o);
>
> Count 4 charged DeSoto only with violating the "Hobbs Act" by the commission of a robbery of a

"7-11" store on January 13, 2000, in violation of 18 U.S.C. § 1951(a);

Count 5 charged DeSoto and Nuñez with violating the "Hobbs Act" by the commission of a robbery of the "Isla De Los Galapagos" restaurant on February 5, 2000, in violation of 18 U.S.C. §§ 1951(a) and 2;

Count 6 charged DeSoto and Nuñez with attempting to possess with intent to distribute five or more kilograms of cocaine on February 5, 2000, in violation of 21 U.S.C. § 841(a)(1);

Count 7 charged DeSoto and Nuñez with carrying a firearm during a crime of violence and drug trafficking crimes on February 5, 2000, as alleged in Counts 5 and 6 of the indictment, in violation of 18 U.S.C. § 924(c); and

Count 8 charged DeSoto and Nuñez with violating the "Hobbs Act" by the commission of a robbery of the "La Catalana" bakery on February 15, 2000, in violation of 18 U.S.C. §§ 1951(a) and 2.

(App. 17)

The Defendant was acquitted of Counts 1 and 6 which charge Title 21 violations of 21 U.S.C §§ 841 and 846.

Counts 2 through 8 of the indictment do not specifically charge within the respective counts what are commonly referred to as Federal Sentencing Guideline "adjustments" or "enhancements." The Indictment does not describe or charge Sentencing Guidelines "grouping" penalties nor does the Indictment specify amounts of money or other nonspecific conduct involved in the charged robberies. The jury was not requested to nor did it make such related findings.

2. Federal Sentencing Guideline Presentence Investigation Report (PSR).

A Presentence Investigation Report (PSR) was prepared establishing for the benefit of the district court the federal guideline ranges for all offenses described, even those beyond the counts of conviction, with one exception. Count 7 requires a mandatory minimum consecutive 7-year jail term and is not the subject of this petition nor a guideline analysis.

The PSR sets forth guideline calculations for four separate groupings of offense conduct. Those groups encompass four separate robberies, three of which are separately charged as specific counts in the Indictment.

Group 1 includes a January 13, 2000 robbery which is charged under Count 4.

Group 2 includes a February 5, 2000 robbery which is described in Count 5.

Group 3 includes a February 15, 2000 robbery which is set forth in Count 8.

Group 4 includes a February 19, 2000 robbery which is incorporated in the Hobbs Act conspiracy charged under Count 2 of the Indictment. The PSR reflects the Petitioner has no criminal history whatsoever, save for this case. Therefore, he falls under Criminal History Category I (CHC).

As described in the appendices PSR excerpt, the sentencing report mandates Petitioner's punishment include enhancements that are neither charged within the Indictment, presented to a jury, nor determined by the

Court or the jury by the beyond a reasonable doubt standard.

Petitioner's Base Offense Level stands at 20, with a guideline range to 31 to 41 months ***before the uncharged, non-verdict related enhancements, adjustments, and "groupings."***[1]

The Petitioner sets forth below the relevant uncharged enhancements and adjustments for each respective count which, according to the PSR calculations, substantially increase the guideline sentence within what is commonly referred to as "groupings." *See* U.S.S.G. § 3D1.1 *et seq.*

As to the first group,

1. Uncharged bodily injury increasing the offense level by two additional levels pursuant to U.S.S.G. § 2B3.1(b)(3)(A).

2. The offense involved an uncharged loss of more than $10,000 and therefore the base offense level is increased by an additional level pursuant to § 2B3.1(b)(7)(B).

3. Because the offense involved an uncharged abuse of public trust in a manner that significantly facilitated the commission of the crime, § 3B1.3, the base offense level was increased by an additional two levels.

Similarly, Group 2 (the February 2, 2000 robbery) likewise begins with a Base Offense Level of 20, with a

---

[1] An increase in the base offense level is synonymous with an increase in the "guideline range."

guideline range of 31-41 months with the following additional enhancements:

1. Uncharged bodily injury increases the offense level by two additional levels pursuant to U.S.S.G. § 2B3.1(b)(3)(A).

2. Because the offense involved an uncharged loss of more than $10,000; therefore the base offense level is increased by an additional level pursuant to § 2B3.1(b)(7)(B);

3. Because the offense involved an uncharged abuse of public trust in a manner that significantly facilitated the commission of the crime, under § 3B1.3, the base offense level is increased by an additional two levels.

4. Because the offense involved an uncharged/unindicted abduction, therefore the base offense level is increased by four additional levels pursuant to § 2B3.1(b)(4)(A).

5. Because the offense involved an uncharged carjacking, pursuant to § 2B3.1(b)(5) the base offense level is increased by two additional levels.

6. Because an uncharged controlled substance was taken under § 2B3.1(b)(6), the base offense level is increased by one level.

As to Group 3, (the February 15, 2000 robbery charged under Count 8), the base offense level is 20, with a guideline range of 31-41 months, to which the following enhancements were imposed:

1. Because the offense involved an abuse of public trust in a manner that significantly facilitated the commission of the crime, under § 3B1.3, the base offense level was increased by an additional two levels.

2. Because the Defendant knew or should have known of the vulnerable victim, pursuant to § 3A1.11(b)(1), the base offense level is increased by two levels.

Finally as to Group 4 (describing Count 8, the February 19, 2000 robbery), the base offense level is 20, with a guideline range of 31 to 41 months to which the following enhancement is imposed:

1. Because the offense involved an abuse of public trust under § 3B1.3, in a manner that significantly facilitated the commission of the crime, the base offense level was increased by an additional two levels.

In summary, the initial 31-41 guideline range was exponentially increased even before the Probation Office engaged in uncharged multi-count adjustments/enhancements also pursuant to the uncharged grouping provisions of U.S.S.G. § 3D1.1 These likewise increased the base offense level as evidenced by the PSR. Under the PSR, *Part D, All Sentencing Options Guideline Provisions*, "the guideline imprisonment range is 151-188 months."

3. Sentencing on September 11, 2002 (DE: 109).

At sentencing, the district court sentenced Petitioner consistent with (1) the uncharged four separate groupings, (2) the uncharged enhancements, as well as (3) the uncharged adjustments described in the sentencing Report.

The District Court sentenced Petitioner as follows: imprisonment "for a term of 188 months as to Counts II, III, V, and VIII, and 84 months as to Counts 7, to run consecutively to the other Counts. The punishment on Counts II, III, V, and VIII amount to 157 months above the low-end guideline range for a Base Offense Level twenty (20) before the enhancements, adjustments, and groupings combine for a more onerous punishment.

REASONS FOR GRANTING THE WRIT

I. Preface.

This Petitioner was punished for conduct that was neither charged, indicted, nor found by a jury. The court utilized the United States Sentencing Guidelines as an unassailable restrictive dictate – notwithstanding Fifth and Sixth Amendment requirements. Here, the difference between the Federal Sentencing Guideline range of 31-41 months as established by his Base Offense Level of 20 for "robbery" and the 188 months imposed is a consequence of an extraordinary number of uncharged enhancements, adjustments and groupings. This consequence speaks to the important application of *United States v. Booker*, 2005 WL 50108 (U.S.), *Blakely v. Washington*, 124 S. Ct. 2531 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000) to this case. The Petitioner respectfully invites this Honorable Court to insure that its decisions in *Booker, Blakely* and *Apprendi* will uniformly apply to *all* on direct appeal. *Booker* and *Fanfan* hold that the defendants' Sixth Amendment rights to trial by jury are violated because the guidelines gave judges the power to make findings of fact beyond a jury's verdict that were used to increase sentences. In its second opinion, the court decided to remedy

the problem and protect the rights of defendants by declaring the guidelines are advisory, not mandatory. In this case, the Petitioner suffers an extraordinary amount of jail time for matters not even charged.

As further argued below, only this Court can insure uniform circuit application of *Booker*, *Blakely* and *Apprendi* at federal sentencings, including issues of departures, enhancements, and specific offense characteristics resulting from what now appears to be earlier unconstitutional application of the Federal Sentencing Guidelines. As further argued below, uniform application to all defendants on direct appeal is necessary to insure uniform justice.

The Petitioner recognizes the gravamen of this application is the subject of an extraordinary number of petitions for certiorari review.

The related companion cases of *United States v. Booker/Fanfan*, 2005 WL 50108 (U.S.) have been decided and are now the law of the land. That law should be uniform to all still on direct appeal. In *United States v. Booker*, the Court concludes (1) federal sentencing guidelines are subject to the jury trial requirements of the Sixth Amendment; (2) the Sixth Amendment requirement that a jury find certain sentencing factors is incompatible with the Federal Sentencing Act, thus requiring severance of the Act's provisions which makes the guidelines mandatory; (3) the proper standard of appellate review is reasonableness, and (4) the Sixth Amendment's application as well as this Court's remedial interpretation of the Sentencing Act is applicable to all cases on direct review. ***However, it is important that all Defendants still on direct appeal, even those before this Court on application for certiorari, who did not raise the issue***

below, receive the benefit of this Court's instructions concerning constitutional sentencing proceedings.

In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), this Court determined "[o]ther then the fact a prior conviction, any fact that increases the penalty for crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi* concerned the right and jurisdiction of the trial court to increase the defendant's sentence because the crime was racially motivated, though "racial motivation" was not charged nor bound by the jury.

In *Blakely v. Washington*, 124 S. Ct. 2531 (2004), this Court extended *Apprendi* to circumstances where a defendant's punishment is increased by the use of facts other than those based solely on a jury verdict or plea. The *Blakely* decision calls into question the constitutionality of the federal courts to impose aggravated prison terms under the sentencing rules and procedures applied in this case, which includes uncharged enhancements/adjustments/groupings; none of which are charged nor found by a jury.

In *Glover v. United States*, 531 U.S. 198 (2001) this Court recognized that each extra day in jail amounts to a constitutionally cognizable complaint when the extra time is based upon a constitutional violation.

Certiorari should be granted in order to provide an opportunity to settle and clarify the conflict between the Circuits as to whether the appellate courts should consider, *sua sponte*, the law changing decisions of this Court which should be applicable to all cases on direct review.

II. Certiorari review should be granted to ensure that defendants on direct appeal within the United States Court of Appeals for the Eleventh Circuit are not excluded from the benefit of law changing decisions of this Court rendered subsequent to filing their opening briefs.

a. The Eleventh Circuit decision in *Levy* is contradictory to a long line of Supreme Court cases.

Writ of Certiorari should be granted to support the uniform opinion of this Court that, at a minimum, all defendants whose cases were still pending on direct appeal at the time of a law-changing decision should be entitled to invoke the new rule. *See United States v. Johnson*, 457 U.S. 456, n.9 (1982); *Schriro v. Summerlin*, 124 S. Ct. 2519, 2523 (2004); *Griffith v. Kentucky*, 479 U.S. 314, 322-23 (1987).

The former Chief Judge of the United States Court of Appeals (Tjoflat, J.) for the Eleventh Circuit severely criticized contrary Eleventh Circuit opinions *United States v. Levy*, 391 F.3d 1327 (11th Cir. 2004)[2] and *United States*

---

[2] *Levy* overlooks binding Supreme Court precedent and rejects contrary opinions from every other circuit. In doing so, *Levy* elevates the Eleventh Circuit's procedural rules concluding that they operate "independently of *Griffith*" and considers law-changing decisions of the Supreme Court to be nothing more than "unpreserved error." *Levy*, 391 F.3d 1327, 1332 (11th Cir. 2004). *Levy* would require a criminal Defendant to raise every single issue in which there is clear adverse precedent in his opening brief, thereby alienating the very court he seeks to impress, on the happenstance that the Supreme Court will invoke a law-changing decision. Such procedural default rules are unduly harsh and promotes tedious, vexatious, and redundant litigation – all of which do not serve the interest of justice.

v. Ardley, 273 F.2d 991 (11th Cir. 2001) (denying rehearing *en banc* and explaining *Apprendi* claim was procedurally barred), *cert. denied*, *Ardley v. United States*, 535 U.S. 979 (2002).

As further argued here, Circuit Judge Tjoflat takes the position, joined by this Petitioner, that the Eleventh Circuit's *Ardley-Levy* rule violates the Supreme Court's directive in *Griffith* which requires law changing decisions to be applied in all cases on direct appeal. Judge Tjoflat convincingly makes the case for granting certiorari review stating,

> **This continues to be the only circuit in which 'cases are entitled to the benefit of an intervening decision only if: 1) the case was not yet final at the time of the intervening decision; and 2) the litigant presaged the intervening decision by raising the issue addressed by that decision in the litigant's initial brief on appeal.'**

Levy, 391 F.3d 1327, 1340 (11th Cir. 2004) (Tjoflat, J., dissenting from the denial of rehearing *en banc*).[3] Judge Tjoflat suggests that the unique position of the Eleventh Circuit is predicated upon resistance to sentencing "do-overs." *Id.* Concern for "do-overs" flies in the face of the historical notions of uniform justice and the reasoning

---

[3] Relying upon his dissent in *Ardley*, 273 F.3d at 999, Tjoflat also states, "In *Ardley* and again here, this court has essentially superimposed an additional requirement on retroactivity determinations. While the Supreme Court has clearly stated that *all* cases pending on direct appeal and at the time of an intervening decision are entitled to the benefits of a new rule, the panel's decision *narrows* the class of cases entitled to retroactivity."

described by this Court to support its decision that new constitutional rules shall apply to all on direct appeal.

This Court has long extolled the norm of principled decision making. Given this principle, it is difficult to accept how the Eleventh Circuit, in contrast to governing Supreme Court case law, could apply a new constitutional rule, whether labeled procedural or substantive, only to a litigant who prophesized the law-changing decision. The Supreme Court long ago repudiated making the single exception the particular litigant whose case was chosen as the vehicle for establishing that rule or *see Johnson*, 457 U.S. at 546, *citing Desist v. United States*, 394 U.S. 244, 258 (1969) (*dissenting opinion*). To only selectively apply a new constitutional rule to the fortunate one or few would severely damage the important principle enunciated with the Bill of Rights of treating similarly situated defendants similarly.

The notion of even handed justice for similarly situated litigants is a principled theme of an evolved society and harkens back to the earlier opinions of Justices Black and Douglas cited in *Johnson*. The citizens of this Country have the right to expect the courts of the United States to treat all similarly situated defendants equally before the bar of justice. The public perception of what really constitutes Due Process and Equal Protection of the law requires no less. To only allow Messrs. Booker, Fanfan, or Blakely to benefit from these new rules or the odd defendant who dreamt of *Blakely's* holding, notwithstanding contrary binding circuit precedent, is inconsistent with how we envision ourselves as a nation of law, rather than as lottery-type players.

In what later became the law of the land in *Johnson*, Justice Harlan described the need for uniform application in the dissent authored in *Mackey v. United States*, 401 U.S. 677 (1971), "Simply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new Constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule constitute an indefensible departure from this model of judicial review." *Id.* at 678-679. Nuñez is now swims in that stream, exclusive to the Eleventh Circuit. It is for these reasons that *Johnson* accepts Justice Harlan's dissent in *Desist* concerning what cases are reviewable concluding,

> [W]hen another similarly situated defendant comes before us, we must grant the same relief or give a principled reason for acting differently. We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a 'new' rule of constitutional law." *Desist v. United States*, 394 U.S., at 258-259, 89 S. Ct., at 1038-1039 (dissenting opinion). Justice Harlan suggested one simple rule to satisfy all three of his concerns. "I have concluded that *Linkletter* was right in insisting that all 'new' rules of constitutional law must, at a minimum, be applied to all those cases which are still subject to direct review by this Court at the time the 'new' decision is handed down." *Id.*, at 258, 89 S. Ct., at 1039. "[A] proper perception of our duties as a court of law, charged with applying the Constitution to resolve every legal dispute within our jurisdiction on direct review, mandates that we apply the law as it is at the time, not as it once was." *Mackey v. United States*, 401 U.S., at 681, 91 S. Ct., at 1174 (separate opinion).

> We now agree with Justice Harlan that "'[r]etroactivity' must be rethought," *Desist v. United States*, 394 U.S., at 258, 89 S. Ct., at 1038 (dissenting opinion). We therefore examine the circumstances of this case to determine whether it presents a retroactivity question clearly controlled by past precedents, and if not, whether application of the Harlan approach would resolve the retroactivity issue presented in a principled and equitable manner.

United States v. Johnson, 457 U.S. at 547-548 (1982).

This Court holds that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." *Griffith*, 479 U.S. at 322. The *Griffith* court states that "After we have decided a new rule in the case selected, the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review." *Id.* at 322-23. In so holding, the Court makes clear that it would not harbor an exception to retroactivity in which the new rule constitutes a "clear break" with the past. *Id.* at 328.

> [i]n Justice Harlan's view, and now in ours, failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication . . . [A]fter we have decided a new rule in the case selected, the integrity of judicial review requires that we apply that rule to ***all similar cases pending on direct review.***

Griffith, 479 U.S. at 322-23. (Emphasis added). There are no exceptions to the *Griffith* rule. To the contrary, this Court recently restated its "no exceptions to the *Griffith* rule" in *Schriro v. Summerlin*, 124 S. Ct. 2519 (2004). As

to convictions that are already final, however, the rule applies only in very limited circumstances.

---

b. The Eleventh Circuit decision in *Levy* directly contradicts every other Circuit.

Beyond this Court's opinions in *Booker*, *Schriro*, *Griffith*, and *Johnson*, all other circuits (except the Eleventh) appear to freely allow Petitioners to raise Supreme Court precedent or will even consider this Court's precedent *sua sponte*.

In the aftermath of *Blakely* and *Apprendi*, a number of courts faced the same precise issue and all (except for the Eleventh Circuit) reached the merits of claims like *Nuñez*.

To the contrary, the unique rule in the Eleventh Circuit, is to exclude the application of new rules to direct case appellants unless they raised the law changing issue within the opening brief. *See United States v. Duncan*, 381 F.3d 1070, 1073 (11th Cir. 2004). Because in his initial brief, *Duncan* made the *Apprendi*-type argument only with respect to the drug type issue, and not with respect to other enhancements, i.e., the firearm and role enhancements, the Eleventh Circuit concluded he is not entitled to a *Blakely* review. In doing so, the Eleventh Circuit cites *United States v. Nealy*, 232 F.3d 825, 830 (11th Cir. 2000) ("Defendant abandoned the [*Apprendi*] indictment issue by not raising the issue in his initial brief.") (further citations omitted).

On this point, the Eleventh Circuit is undeniably in conflict with several other circuits. For example, in *United States v. Rogers*, 118 F.3d 466, 471 (6th Cir. 1997), the

Sixth Circuit rejected the Government's argument that the defendant had "waived" a claim based on a then-recent Supreme Court decision by failing to object at trial or advance the claim in his initial brief. The court's reasoning was simple: "[o]f course, [the defendant] could not have knowingly waived a constitutional right that evolved after he filed his appellate brief because raising the issue would have been futile in light of then-applicable precedent." *Id.* Similarly, in a case in which "*Apprendi* was decided after briefing and one of the defendants refer[red] [the court] to the new decision in his post-argument brief," the Fifth Circuit concluded that it was "not completely accurate to characterize the issue as waived or abandoned" and thus considered the claim under the plain error standard. *United States v. Miranda,* 248 F.3d 434, 444 (5th Cir. 2001). And finally, in a recent case that was briefed and argued pre-*Blakely,* the Seventh Circuit reasoned that "[g]iven the precedent in this circuit prior to *Blakely,* we think it would be unfair to characterize [the defendant] as having waived a challenge to the validity of her sentencing enhancement." *United States v. Pree,* 384 F.3d 378, 396 (7th Cir. 2004); *accord United States v. Henningsen,* 387 F.3d 585, 591 (7th Cir. 2004). Indeed, the court raised the issue *sua sponte* and concluded that there had been no waiver notwithstanding the defendant's failure to raise the *Blakely* issue in any sort of post-*Blakely* submission. *Pree,* 384 F.3d at 396-97.

In a post-*Booker* case, the very conservative Fourth Circuit concludes that *Blakely/Booker* violations amount to plain error and concludes, "to leave standing the sentence imposed under the mandatory guideline regime, we have no doubt is to place in jeopardy 'the fairness integrity or public reputation of judicial proceedings.' . . . We therefore

exercise our discretion to correct this plain error." *United States v. Hughes*, 2005 WL 147059 (4th Cir. January 24, 2005).

The clearest statements in these post-*Blakely* cases have come from the Seventh Circuit in *United States v. Pree*, and from the Ninth Circuit in *United States v. Ameline*, 376 F.3d 967 (9th Cir.2004). In *Ameline*, even though the defendant "made no challenge to the applicable standard of proof or to the judge's factfinding authority," the Ninth Circuit held "that the Sixth Amendment implications of *Blakely* allow[ed] [the court] to examine *sua sponte* its potential impact on [the defendant's] sentence." *Id.* at 974. Thus, while the Seventh and Ninth Circuits have raised the *Blakely* issue *sua sponte*, the Eleventh Circuit has refused to consider even claims raised in supplemental briefs filed shortly after *Blakely* was decided. And while *Pree*, 384 F.3d at 396-97, *Ameline*, and the decisions of the Fifth and Sixth Circuits are perhaps the clearest discussions of this issue, the cases cited in note 4 below demonstrate that the Eleventh Circuit is truly unique on this issue. The eleven other federal circuits that have been presented with claims like Nuñez and *Levy* have all considered the merits of those claims.[4]

---

[4] *See, e.g., United States v. Glenn*, 389 F.3d 283, 287-88 (1st Cir. 2004) (reviewing for plain error a *Blakely* claim first raised in a supplemental brief); *United States v. Stearns*, 387 F.3d 104, 106-07 (1st Cir. 2004) (reviewing for plain error a *Blakely* claim first raised in a post-oral argument letter); *United States v. Satterfield*, 2004 WL 2491574, at *1 (4th Cir. Nov. 5, 2004) (unpublished op.) (reviewing for plain error *Blakely* claim first raised in a supplemental brief); *Henningsen*, 387 F.3d at 591 ("Although [the defendant] did not raise the [*Blakely*] issue . . . in his brief, he made notice of the *Blakely* and *Booker* decisions in a subsequent filing and raised the issue during argument. In light of the uncertainty surrounding this issue and the questionable

(Continued on following page)

constitutionality of [his] sentencing enhancement, we do not find that [he] has waived his [claim]."); *United States v. Griffith*, 385 F.3d 124, 127 (2d Cir. 2004) (ordering that, notwithstanding the defendant's failure to raise a *Blakely*-type claim in his initial brief, "the mandate in this case will be held pending the Supreme Court's decision in *Booker* and *Fanfan*" and that "the parties will have until 14 days following the Supreme Court's decision to file supplemental petitions for rehearing"); *United States v. Moore*, 109 Fed. Appx. 503, 505, n. 2 (3d Cir. 2004) (unpublished op.) (noting that a *Blakely* claim that was first raised in a supplemental brief would be reviewed for plain error but declining to grant the defendant's motion to file such a brief because it was clear that he could not establish plain error); *United States v. Cordoza-Estrada*, 385 F.3d 56, 59 (1st Cir. 2004) (reviewing for plain error a *Blakely* claim first raised in a Rule 28(j) letter sent to the court the day before oral argument and noting that "[s]ince Appellant's argument depends upon a decision that did not exist at the time of briefing, a 28(j) letter is a perfectly appropriate avenue by which to present it"); *Pree*, 384 F.3d at 396-97 (raising *Blakely* issue *sua sponte*); *United States v. Pepsny*, 108 Fed. Appx. 713, 716-17, 2004 WL 1873996 at *3 (3d Cir. 2004) (unpublished op.) (remanding for re-sentencing on non-*Blakely* grounds and stating that a defendant who first raised a *Blakely* claim in a post-argument filing could attempt to raise the *Blakely* issue on remand); *United States v. Musleh*, 106 Fed. Appx. 850, 857 n. 4, 2004 WL 1858247, at *5 n. 4 (4th Cir. 2004) (unpublished op.) ("The Supreme Court issued its decision in [*Blakely*], shortly after we heard oral argument in this case. [Although the defendant had not raised a *Blakely*-type claim, we] then *sua sponte* ordered the parties to submit supplemental briefing respecting the effect of *Blakely* on the Federal Sentencing Guidelines."); *United States v. Badilla*, 383 F.3d 1137, 1142 n. 2 (10th Cir. 2004) (reviewing for plain error a *Blakely* claim that was first raised in a motion for post-submission consideration); *United States v. Westover*, 107 Fed. Appx. 840, 847, 2004 WL 1790016, at *6 (10th Cir. 2004) (rejecting all claims raised in the defendant's brief but retaining jurisdiction and permitting a supplemental "brief to raise additional issues in light of *Blakely*," which was "decided after initial briefing and argument"); *United States v. Ameline*, 376 F.3d 967, 974 (9th Cir. 2004) ("Our precedent provides ample support for our authority to consider *sua sponte* a [*Blakely*] claim that was not initially raised on appeal.").

The Eighth Circuit will hold the mandate in all *Blakely* cases and consider *Blakely* claims after *Booker* and *Fanfan* are decided. *See, e.g.*, Administrative Order Regarding *Blakely* Cases (8th Cir. Sept. 27, 2004),

(Continued on following page)

In addition, in *United States v. Byers*, 740 F.2d 1104 (D.C. Cir. 1984), then-judge Scalia wrote:

> Neither at trial nor on appeal did appellant raise this Sixth Amendment claim. Appellant concedes that it was asserted for the first time (by new counsel) in his Petition for Rehearing and Suggestion for Rehearing En Banc. Appellees argue that we are therefore precluded from considering it. It is true as a general rule that appellate courts will not consider questions raised for the first time on appeal. However, we are "bound to consider any change, either in fact or in law, which has supervened since the judgment [from which appeal is taken] was entered," *Patterson v. Alabama,* 294 U.S. 600, 607, 55 S. Ct. 575, 578, 79 L.Ed. 1082 (1935). We think that the Supreme Court's decision in *Estelle v. Smith,* [451 U.S.

---

at http://www.ca8.uscourts.gov/files/blakelyfinal.pdf; *United States v. Babiar,* 390 F.3d 598 (8th Cir. 2004); *United States v. Pierce,* 388 F.3d 1136 (8th Cir. 2004); *see also United States v. Pirani,* 2004 U.S.App. LEXIS 16117, at *21-36 (8th Cir. Aug. 5, 2004) (reviewing for plain error *Blakely* claim first raised after oral argument), *op. vacated and reh'g en banc granted,* 2004 U.S.App. LEXIS 17012 (8th Cir. Aug. 16, 2004); *United States v. Poulack,* 236 F.3d 932, 935-37 (8th Cir. 2001) (reviewing for plain error *Apprendi* claim first made in a supplemental brief after the defendant failed to object at sentencing or raise the issue in his initial brief).

State appellate courts are also considering the merits of claims like Levy's. *See, e.g., State v. Miranda-Cabrera,* 99 P.3d 35, – (Ariz. Ct. App. 2004) ("[T]he State argues that [the defendant] waived any claim he might have to resentencing pursuant to . . . *Blakely* by failing to raise it at the sentencing hearing or in his opening brief. . . . Decisions of the United States Supreme Court that create new rules apply to all criminal cases still pending on direct review. *Griffith v. Kentucky.* Because [the defendant's] case is still pending on direct review, we will consider the application of the rule set forth in *Blakely* to the sentencing in his case." (citations omitted)). *See* further supporting state citations at *Levy*, 391 F.3d 1327, 1344 (11th Cir. 2004) (Tjoflat, dissent).

> 454, 101 S. Ct. 1866, 68 L.Ed.2d 359 (1981),] handed down during our consideration of [appellant's] Petition for Rehearing, which elevated [appellant's] Sixth Amendment claim from completely untenable to plausible, invokes this limited exception.

Id. at 1115 n. 11 (Scalia, J.) (citations omitted). Judge Scalia wrote for only six of twelve participating judges. Judge Bazelon's dissent, joined by Judges Wald and Mikva, agreed that the Sixth Amendment claim was properly before the court for the same reasons. *See id.* at 1161 n. 138. The D.C. Circuit's reasoning is particularly apt here given that *Blakely* similarly "elevated [Levy's claim] from completely untenable," *see United States v. Sanchez,* 269 F.3d 1250, 1262 (11th Cir. 2001), "to plausible."

A good example of the manner in which criminal defendants are dissimilarly treated between the Circuits is found by comparing two recent cases from the First Circuit with the Eleventh Circuit opinion in *Duncan*. In *United States v. Coyne*, 114 Fed. Appx. 5, 6 (1st Cir. 2004) (table decision), after briefing was complete, the defendant was permitted to file a supplemental brief discussing the impact on his appeal of the Supreme Court's intervening decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004). In that brief, *Coyne* argues that *Blakely* entitles him to resentencing because his sentence was increased on account of two factors that were neither admitted by him nor proved to a jury beyond a reasonable doubt. In the Eleventh Circuit no such permission is granted. Similarly, in *United States v. Stearns*, the defendant simply wrote a letter to the First Circuit after oral argument was completed noting the Supreme Court's ruling in *Blakely*. Although in neither *Coyne* or *Stearns* obtained relief under

Blakely, *United States v. Stearns*, 387 F.3d 104, 106 (1st Cir. 2004) the First Circuit did review their sentencing for *Blakely* error. *See also*, *United States v. Kinter*, 235 F.3d 192, 198-199 (4th Cir. 2000) ("Finally, we permitted Kinter to file a supplemental brief addressing the relevance to his case of the Supreme Court's recent decision in *Apprendi v. New Jersey*, 530 U.S. 466, (2000).")

On the more permissive side of this issue are a number of Ninth Circuit cases beyond *United States v. Ameline*. In another case, the Ninth Circuit noted,

> We have recognized certain narrow exceptions to the general rule against review on appeal of issues not raised below: "if (1) there are 'exceptional circumstances' why the issue was not raised in the trial court, (2) the new issue arises while the appeal is pending because of a change in the law, or (3) the issue presented is purely one of law and the opposing party will suffer no prejudice as a result of the failure to raise the issue in the trial court." *United States v. Carlson*, 900 F.2d 1346, 1349 (9th Cir. 1990). *See United States v. Smith*, 905 F.2d 1296 (9th Cir. 1990). Further exception may be made when plain error has occurred and an injustice might otherwise result. *See Whitten*, 706 F.2d at 1012; Fed. R. Crim. P. 52. In any particular case, these limited exceptions may apply to a claim that a plea agreement has been violated. The Eleventh Circuit shares our view, as evidenced in *Edwards*, that a claim of violation of a plea agreement generally may not be raised for the first time on appeal. *See United States v. Jefferies*, 908 F.2d 1520, 1524 (11th Cir. 1990). [FN1] However, the Third and Tenth Circuits take a different view of this matter and have held that the alleged

> breach of a plea agreement may be raised for the first time on direct appeal. *See United States v. Hand*, 913 F.2d 854, 856 n. 2 (10th Cir. 1990); *United States v. Moscahlaidis*, 868 F.2d 1357, 1360 (3d Cir. 1989). With no additional analysis, both *Hand* and *Moscahlaidis* merely rely on citation to authorities which are distinguishable from the case before us.

United States v. Flores-Payon, 942 F.2d 556, 558-559 (9th Cir. 1991). *See also, United States v. Perez-Covarrubias*, 983 F.2d 1079, 1993 WL 5174, 1 (9th Cir. 1993) (Table Decision) ("We address this issue raised for the first time on appeal because the new issue arose due to a change in the law while the appeal was pending. *See United States v. Flores-Payon*, 942 F.2d 556, 558. The government concedes that the holding in *United States v. Campos-Martinez*, 976 F.2d 589, 591-592 (9th Cir. 1992), filed subsequent to the judgment of the district court, requires that the instant sentence be vacated and remanded. Perez-Covarrubias adopts this argument, raised by the government, in his Reply Brief").

CONCLUSION

Here, given the stark and clear precedent of *Griffith, Schriro*, and *Johnson* suggesting plenary review to all who would benefit from new law to those on direct appeal, and the Circuit precedent allowing law changing decisions to apply everywhere except the Eleventh Circuit, a uniform rule is appropriate in the *Booker/Blakely* context.

This Court's decision in *Booker* and *Fanfan* leaves open the issue of which class of direct appellants may benefit in the context of the circuit conflict regarding law

changing decisions where the change was not anticipated nor raised through the courts below. Because the historical message sent to practitioners was not to raise excessive issues which had already been decided by either the appellate or Supreme Court adverse to their clients, the failure to grant certiorari will essentially serve to punish this Petitioner for following the dictates of the appellate courts. The Eleventh Circuit decision in *United States v. Sanchez*, 269 F.3d 1250 (11th Cir. 2001) as well as other cases foreclosed the opportunity to litigate the sentencing issues recently decided in *Booker* and *Fanfan*. The dispositive nature of the earlier Eleventh Circuit case law should not preclude this direct appellant from benefiting from this Court's conclusion that the sentencing guidelines are purely advisory and that sentencing enhancements require jury determinations or guilty plea admissions.

Because this Court's decision in *Booker* and *Fanfan* leaves a discretionary circuit conflict concerning the class of direct appellants who may benefit from its law changing decisions, certiorari should be granted to resolve the issue. Alternatively, the Petitioner respectfully invites remand to the United States Court of Appeals for the Eleventh Circuit with instructions that resentencing be ordered consistent with *United States v. Booker*, 2005 WL 50108 (U.S.).

Respectfully submitted,

NEIL M. SCHUSTER
NEIL M. SCHUSTER, P.A.
555 N.E. 15 Street, Suite 2C
Miami, FL 33132
Tel: (305) 416-0324/Fax: (305) 416-0325
Email: nmschus@bellsouth.net
Florida Bar No. 216909
Attorney for Petitioner

INDEX TO APPENDICES

1. *United States v. Nuñez,* Case No. 04-10463-HH, U.S. Court of Appeals for the Eleventh Circuit, *per curiam* affirmance.....App. 1

2. *United States v. Nuñez,* Case No. 02-15239 & 02-15426, U.S. Court of Appeals for the Eleventh Circuit, affirmed in part, vacated and remanded in part .....App. 10

3. *United States v. Nuñez,* Case No. 01-CR-981-Moore, S.D. Fla., Judgment in a Criminal Case, DE 110.....App. 34

4. *United States v. Nuñez,* Case No. 01-CR-981-Moore, S.D. Fla., Sentencing Tr. 9/11/02, DE 127.....App. 43

5. *United States v. Nuñez,* Case No. 04-10463-HH, U.S. Court of Appeals for the Eleventh Circuit, Order denying Petition for Rehearing and Suggestion for Rehearing en banc .....App. 50

6. Constitutional, Statutory, Provisions, and Governing Sentencing Guidelines.....App. 52

7. *United States v. Nuñez,* Case No. 01-CR-981-Moore, S.D. Fla., PreSentence Investigation Report, Excerpts .....App. 58

8. *United States v. Nuñez,* Case No. 01-CR-981-Moore, S.D. Fla., Indictment, DE 17.....App. 65

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-10463
Non-Argument Calendar

D.C. Docket No. 01-00981-CR-KMM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CECILIO NUÑEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(Filed AUGUST 26, 2004)

Before ANDERSON, HULL and WILSON, Circuit Judges.

PER CURIAM:

Defendant-Appellant Cecilio Nuñez ("Defendant Nuñez" or "Nuñez") is a former police officer, who is serving a 272-month sentence for robbery and other offenses. After an evidentiary hearing in the district court, Nuñez appeals the district court's denial of his motion for a new trial based upon newly discovered evidence. After, review, we affirm.

I. BACKGROUND

A federal grand jury returned an eight-count indictment against Defendant Nuñez and his codefendant, Orestes DeSoto, relating to a series of robberies. Nuñez pled not guilty to the charges and proceeded to a jury trial. DeSoto pled guilty and testified against Nuñez: The jury found Nuñez guilty of conspiracy to commit robbery under the Hobbs Act, in violation of 18 U.S.C. § 1951(a) (count 2); conspiracy to use a firearm during a crime of violence and drug trafficking crime, in violation of 18 U.S.C. §§ 924(c) and (o) (count 3); two counts of Hobbs Act robbery, in violation of 18 U.S.C. §§ 2 and 1951(a) (counts 5 and 8); and using a firearm during a crime of violence and drug trafficking crime, in violation of 18 U.S.C. §§ 2 and 924(c) (count 7). Nuñez appealed.

Following his conviction but before sentencing, Nuñez moved for a new trial. On the day of sentencing, Nuñez supplemented his new trial motion, claiming to have newly discovered evidence. Specifically, the supplement to the motion stated that Rafael Olivares, a federal prisoner, would testify that a government witness in Nuñez's trial, Alberto Garcia, admitted that he and co-conspirators Desoto and Juan Castillo fabricated their testimony. Nuñez attached to the supplement an affidavit of his lawyer who had interviewed Olivares in prison and a signed statement of Olivares. The district court denied Nuñez's motion without holding an evidentiary hearing. The district court sentenced Nuñez to 272 months' imprisonment.

In Nuñez's first appeal, this Court vacated the district court's order denying Nuñez's new trial motion, and

remanded for an, evidentiary hearing.[1] During an evidentiary hearing before the district court, Olivares testified that Alberto Garcia admitted to Olivares in prison that Garcia testified falsely against Nuñez to receive a sentence reduction. During that same hearing, Alberto Garcia testified that his testimony at trial was truthful and denied telling Olivares that he had lied at trial.

The district court denied Nuñez's new trial motion for a second time, finding that Olivares's testimony: (1) was inadmissible under Federal Rule of Evidence 608(b); (2) alternatively, was inadmissible under Federal Rule of Evidence 403; and (3) probably would not produce a different result were it presented at a new trial. Accordingly, the district court denied Nuñez's new trial motion.

On appeal, Nuñez argues that the district court abused its discretion by denying his motion for a new trial based on newly discovered evidence.[2]

II. DISCUSSION

A motion for a new trial based on newly discovered evidence should be granted if the movant shows: "(1) the evidence was discovered after trial, (2) the failure of the defendant to discover the evidence was not due to a lack of

---

[1] During the first appeal, this Court also concluded that the district court abused its discretion in excluding the testimony of one of Nuñez's witnesses, but further concluded that "the error was harmless, in light of the substantial evidence adduced at trial of Nuñez's guilt." *United States v. Nuñez*, Nos. 02-15239 & 02-15426, at 23 (11th Cir. Aug. 28, 2003).

[2] Nuñez also argues that, on remand, his case should be assigned to a different district judge. Because we affirm the district court's order, it is unnecessary to address this issue.

due diligence, (3) the evidence is not merely cumulative or impeaching, (4) the evidence is material . . . , and (5) the evidence is such that a new trial would probably produce a different result" *United States v. Jernigan*; 341 F.3d 1273, 1287 (11th Cir. 2003) (quotation marks and citations omitted)[3]

If the new evidence would be inadmissible at a new trial, the fifth requirement for obtaining a new trial will necessarily not be met. *See id.* at 1289. Thus, we first determine whether Olivares's testimony was inadmissible.

The district court determined that Olivares's testimony was inadmissible under Federal Rule of Evidence 608(b), which provides that "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness . . . may not be proved by extrinsic evidence." Fed. R. Evid. 608(b).[4] This Court has explained that the purpose of Rule 608(b) is to avoid a "trial within a trial" over collateral matters. *United States v. Gonzalez*, 71 F.3d 819, 836 (11th Cir. 1996). However, Rule 608(b) allows the admission of extrinsic evidence that "tends to contradict . . . the *material* testimony of a prior witness." *Id.* (internal quotation marks omitted).

---

[3] This Court reviews the denial of a motion for a new trial based upon newly discovered evidence for abuse of discretion. *Jernigan*, 341 F.3d at 1287.

[4] This rule was amended effective December 1, 2003. The purpose of the amendment was "to clarify that the absolute prohibition on extrinsic evidence applies only when the sole reason for proffering that evidence is to attack or support the witness' character for truthfulness." Fed. R. Evid. 608, Advisory Committee Notes.

The district court erred in finding that Defendant Nuñez's new evidence was inadmissible under *Rule* 608(b). While Olivares's proposed testimony cast doubt upon Garcia's "character for truthfulness," it also directly contradicted the co-conspirators' substantive, material testimony concerning Nuñez's participation in the robberies. Indeed, Olivares's testimony directly supported Nuñez's defense that he had been framed and was admissible.

The district court also erred in concluding that Olivares's testimony was inadmissible under Rule 403,[5] which states that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. Olivares's testimony was relevant and had probative value because it supported Defendant Nuñez's theory at trial that government witnesses lied about Nuñez's participation in the crimes in order to receive lower sentences. Its probative value was not outweighed by undue prejudice.

While the district court erred in concluding that Olivares's testimony was inadmissible under Rules 608(b) and 403, we still affirm its denial of Defendant Nuñez's motion, for a new trial. We affirm because Nuñez failed to show that Olivares's testimony probably would have produced a different result if introduced at a new trial. The government presented substantial, corroborated

---

[5] The district court stated that the testimony "would be inadmissible under Rule 403(b)"; however, because Rule 403 does not have subsections, we assume that the district court intended to refer simply to Rule 403.

evidence of Nunez's guilt at trial that went well beyond the testimony of Alberto Garcia.

First, co-conspirators other than Alberto Garcia testified about Nuñez's direct role in the robberies. Juan Castillo testified that Nunez participated in the planning of the robbery of restaurant owner Jose Garcia and provided the co-conspirators with a police badge so they could impersonate police officers when interrogating the victim. Castillo testified that Nuñez used a patrol car to stop Jose Garcia's car, transported Castillo to the garage where co-conspirators were interrogating and holding Juan Garcia hostage, and received a share of the robbery proceeds. Castillo further testified that Nuñez served as a lookout in his patrol car during a robbery of a bakery owner and was supposed to warn the co-conspirators if police were coming. Castillo also testified that Nunez helped plan the robbery of a trailer home that never took place because the co-conspirators were arrested beforehand.

Orestes DeSoto, a co-conspirator and former police sergeant, also testified about Nuñez's participation in several robberies. DeSoto testified that Nuñez used a patrol car to stop robbery-victim Jose Garcia so that co-conspirators could take Jose Garcia to a garage to interrogate him about drug and money in his possession. DeSoto also testified that Nuñez shared in the proceeds of the Jose Garcia robbery. Moreover, DeSoto testified that Nuñez helped plan the trailer home robbery and provided the co-conspirators with two police badges to use in that robbery.

Second, other evidence corroborated the co-conspirators' testimony and connected Nuñez with the co-conspirators during the period of time of the robberies. For

example, cellular phone records showed that Nuñez called codefendant Orestes DeSoto seven times on the day of one of the robberies and that ten calls were made between the two men from 8 p.m. to 10 p.m., the time period which encompassed the robbery. Phone records also showed that there were twenty-four calls between. Nuñez and DeSoto on February 4, 2000, the date on which another robbery was planned but aborted. Additionally, there were eight calls between Nuñez and DeSoto during the two-hour period in which a robbery was committed on February 5, 2000.

At trial the government also offered evidence that Nuñez stated to the officer who arrested him, "I thought if I would be here it would be for a million dollars; not for something petty." This statement was an admission of Nuñez's participation in the crimes and, therefore, contradicts Olivares's testimony that Nuñez was an innocent police officer set up by the other conspirators.

Moreover, one of the robbery victims testified that a police car was parked at the scene of the robbery and that the car drove away without its lights on when she ran toward the vehicle and yelled for help. This evidence further corroborates the testimony of the co-conspirators that Nuñez waited in his police car during the robbery so that he could warn the conspirators if he heard over his radio that police were on the way.

Finally, the proposed new evidence relates to the credibility of Garcia primarily, and to Castillo and DeSoto to some extent, but these witnesses' credibility was already challenged at trial and the new evidence is merely cumulative. For example, Garcia, Castillo, and DeSoto, were thoroughly cross-examined about their agreements

and/or incentives to testify on behalf of the government with the goal of receiving lighter sentences. On cross-examination, Garcia admitted that pursuant to his plea agreement, he would not be prosecuted for certain crimes to which he admitted. Garcia also admitted that his sentencing had been delayed until after Nuñez's trial and that he hoped to receive a favorable sentencing recommendation from the government for providing substantial assistance.

Castillo admitted on cross-examination that while in jail he told Garcia, "[l]et's go and talk with the prosecutor's office and see if we can cooperate with the government to see if we can do something about our sentence." Castillo also admitted that if he cooperated sufficiently, the government could file a motion asking the judge to reduce his sentence. On cross-examination, DeSoto admitted that on several occasions he had lied to prosecutors in this case and that he hoped the government would "help [him] out" for testifying against Nuñez.[6] The cross-examination testimony of Garcia, Castillo, and DeSoto informed the jury of these witness's incentives for falsely implicating Nuñez and of DeSoto's untruthfulness. Thus, Olivares's testimony was cumulative of evidence presented at trial that implied that Garcia, Castillo, and Olivares falsely implicated Nuñez in order to receive lighter sentences.

In light of the co-conspirators' testimony and the substantial evidence presented at trial that corroborated. the testimony of Garcia and the other co-conspirators, the district court did not abuse its discretion in deciding that

---

[6] On direct examination, however, DeSoto stated that he pled guilty without any type of plea agreement.

Olivares's testimony would probably not produce a different result in a new trial.

III. CONCLUSION

For the foregoing reasons, we affirm the district court's denial of Nuñez's motion for a new trial.

AFFIRMED.

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 02-15239 & 02-15426
Non-Argument Calendar

D.C. Docket No. 01-00981-CR-KMM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CECILIO NUÑEZ,

Defendant-Appellant.

Appeals from the United States District Court for the Southern District of Florida

---

(Filed August 28, 2003)

Before CARNES, HULL and WILSON, Circuit Judges.

PER CURIAM:

After a jury trial, Defendant-Appellant Cecilio Nuñez was convicted of: (1) conspiracy to rob, in violation of 18 U.S.C. § 1951(a); (2) conspiracy to possess a firearm during a crime of violence, in violation of 18 U.S.C. § 924(o); (3) robbery, in violation of 18 U.S.C. § 1951(a); and (4) possession of a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(i) and (A)(ii). On

appeal, Nuñez challenges both his convictions and the district court's denial of his motion for a new trial based on newly discovered evidence. After review, we affirm Nuñez's convictions, and vacate the district court's denial of Nuñez's motion for a new trial and remand this case for an evidentiary hearing on Nuñez's motion for a new trial.

I. BACKGROUND

According to the government's evidence at trial, Defendant Nuñez, a Hialeah police officer, conspired with Orestes DeSoto, Juan Castillo, and Alberto Garcia to rob various persons and businesses in Hialeah, Florida. DeSoto was also a Hialeah police officer, and met Nuñez while they both worked as Hialeah police officers. Garcia is DeSoto's cousin, and met Nuñez through DeSoto. Castillo and Garcia also met each other through DeSoto.

Given the issues raised by Defendant Nuñez, we first outline in detail the evidence presented by the government at trial. We then discuss the witnesses Defendant Nuñez attempted to present but the district court disallowed.

A. The Government's Case-in-Chief

January 13, 2000, Robbery of 7-Eleven Manager

In January 2000, DeSoto recruited Officer Nuñez, Garcia, and Castillo to participate in a robbery of a 7-Eleven convenience store located in Miami-Dade County. According to DeSoto, "I told him, [Nuñez] about the 7-Eleven, about all the details and that him [sic] and I would just serve as a lookout and that Garcia and Castillo would do the snatch of deposits, and he just simply said to let him know." However, on the day of the robbery, Defendant

Nuñez informed DeSoto that he would not participate in the robbery because he had to attend a social gathering with his girlfriend.

Ultimately, DeSoto, Garcia, and Castillo participated in the robbery of the 7-Eleven store. DeSoto told Garcia that the robbery had to take place immediately before the manager west to the bank to deposit the cash.[1] As part of the robbery plan, DeSoto gave Garcia pepper spray and told it to spray the manager when he left the store to make the bank deposit.[2]

As the manager left the store and approached Garcia's truck, Garcia sprayed him with pepper spray and grabbed the money from him. Garcia then jumped in his truck and drove away. The men later went to Garcia's home and divided the money from the robbery amongst themselves.

February 5, 2000, Robbery of Restauranteur

DeSoto, Nuñez, and Garcia also planned and participated in the robbery of Antonio Garcia ("Cheo"), who owned and operated Islas Galapagos Restaurant in Hialeah. The defendants believed that Cheo was a drug dealer and planned to steal money and drugs from him.

Garcia, Castillo, and Desoto conducted surveillance of Cheo for a month or two and saw him receiving and

---

[1] DeSoto had expected the 7-Eleven manager to make a large bank deposit of cash "because it was the week of the highest Lotto numbers, money like, it was in the millions. They were expecting 40, 50,000."

[2] Store surveillance videotape for that day showed DeSoto pumping gas into his black Mitsubishi and entering the 7-Eleven store shortly before the robbery.

delivering packages at the rear of his restaurant. The robbery plan was to follow Cheo from his restaurant, and pull him over in a patrol car. Thereafter, Garcia would "play detective, take him out, handcuff him and take him to [Garcia's] warehouse."

DeSoto told Garcia that Defendant Nuñez also would be involved in the robbery because DeSoto had been suspended from the police force after he had proposed the restauranteur robbery idea and, therefore, was not allowed in the police department building. Therefore, Defendant Nuñez's role was to procure a marked Hialeah police patrol car and pull Cheo over.

The group initially had planned to rob Cheo on February 4, 2000, but elected to cancel the robbery that evening because Cheo took an unexpected turn. Cellular telephone and pager records for group members showed a total of 53 calls and pages between DeSoto, Nuñez, and Garcia on the day of the failed robbery attempt. A total of 24 calls on that date were between Nuñez and DeSoto, with most calls having been made between 8:00 p.m. and 10:00 p.m. – the time period during which the group had attempted to follow Cheo.

On the following evening, February 5, 2000, the group followed through with the plan to rob Cheo. Cellular telephone and pager records for February 5, 2000, showed eight calls between DeSoto and Nuñez during the hours of 8:00 p.m. and 10:00 p.m. During that day, Desoto paged Nuñez three times and telephoned him twelve times; Nuñez called DeSoto six times that day.

Garcia was driving a blue Crown Victoria automobile, accompanied by Castillo. They were dressed like undercover

police officers and had police badges, a radio, a gun with a holster, a flashlight and a pair of handcuffs.[3]

While Cheo was driving, he saw a Hialeah Police cruiser behind him. After a short period of time, Defendant Nuñez turned on the patrol car's flashing lights. Cheo pulled over immediately and stopped his truck, but Nuñez did not leave his patrol car.

A few seconds later, Garcia's car approached Cheo's truck. Garcia got out of his car, walked toward Cheo's truck, and called Cheo by name.[4] Garcia told Cheo to get out of his truck and stated that he had an order for Cheo's arrest. When Cheo asked Garcia why he was being arrested, Garcia replied, "we have an informant who has said that a week ago you concluded a drug deal with him."

After Garcia told Cheo that he had an order for his arrest, he handcuffed Cheo and placed Cheo in the car in which he had arrived and had Castillo get out so that Castillo could drive Cheo's truck. Castillo searched Cheo's truck, but did not find any drugs.

Garcia drove Cheo a few blocks away and pulled out a hood and told Cheo to put it on because Garcia did not want Cheo to see the informant's face. When Cheo claimed that he could not put the hood over his head because his hands were cuffed, Garcia placed the hood over Cheo's head and told him to lie down on the seat so that people would not see a hooded man riding in the car.

---

[3] Garcia had received the handcuffs and police badges from DeSoto. DeSoto had obtained the police badges from Nunez.

[4] Later, Cheo identified a photograph of Garcia as the man who had approached him claiming to be a police officer. He claimed to be "90 percent" sure the photograph was of the man who had approached him.

Garcia then drove Cheo to his warehouse, with Defendant Nuñez following immediately behind, and Castillo following in Cheo's truck. Nuñez then picked up Castillo after he parked Cheo's truck and drove him to Garcia's warehouse. Nuñez, however, never went inside the warehouse. Garcia and Castillo testified that Nuñez soon left the area. However, according to DeSoto, Nuñez remained outside during the robbery.

Once Garcia and Cheo were inside the garage, Garcia placed Cheo up against the wall and closed the door. After Castillo and DeSoto entered the warehouse area, DeSoto placed tape over Cheo's eyes so that he would not be able to see anything from under the hood. After Cheo refused to provide any information regarding drugs, the men began to beat Cheo. One of the men then took out a gun and placed it in Cheo's mouth and on the temple of his head.[5]

The men then took Cheo's jewelry, watch, and nearly $2,000 in cash, along with his purse and documents. During the robbery, DeSoto had called Defendant Nuñez on his cellular telephone to tell him that they had gotten money and jewelry from Cheo, but did not find any drugs. Nuñez suggested that they try asking Cheo for more information, but DeSoto told him it was a waste of time.

Cheo was dropped off in front of a local hospital while still wearing the hood. He eventually was discovered by another individual. Following the robbery, Garcia, Castillo,

---

[5] Castillo testified that DeSoto had pointed the gun at Cheo. However, DeSoto's version of the robbery's events was that he did not put the gun in Cheo's mouth. Instead, he acknowledged placing tape over Cheo's eyes during the robbery, but claimed that Castillo had taken the gun and put it in Cheo's mouth.

Nuñez, and DeSoto met at DeSoto's mother's home to divide the proceeds between the four participants. Nuñez's police radio was on while the group divided the proceeds. The group overheard a call about an individual at Hialeah Hospital, handcuffed and walking with a hood over his head. The men all laughed.

Defendant Nuñez later told DeSoto that the Internal Affairs section was looking into the robbery because it believed that a Hialeah police officer might be involved. When DeSoto asked Nuñez about the investigation related to the robbery, Nuñez told him that Sergeant Sergio Velasquez had told him that they were looking into one. According to DeSoto, Nuñez informed DeSoto that he (Nuñez) told Officer Velasquez about the robbery. When DeSoto asked Nuñez why he had discussed the robbery with Officer Velasquez, Nuñez responded, "I got shit on him, so don't worry about it."

February 15, 2000, Robbery of Bakery Owner

The same group also robbed Benigna Mazarra, the owner of La Catlana Bakery in Hialeah. DeSoto frequently ate lunch at La Catlana and told the group that Mazarra often took the proceeds from her bakery and lottery ticket sales home with her in the evening. According to Garcia, "[t]he idea was that DeSoto would be around the area in case something went wrong and we [Garcia and Castillo] had to jump her in his car. . . . [Nuñez] was supposed to be waiting in the corner by the stop sign and as soon as possible I pulled up [Castillo] would jump in and take off with her purse." Castillo further explained that Nuñez's role was to "warn us [the group] on the radio in case the police would come."

On the night of the robbery, DeSoto called Defendant Nuñez on his cellular telephone and told him that the group was getting ready for the robbery. Cellular telephone and pager records for the group showed that there were 19 calls between DeSoto and Nuñez on the night of the robbery, ten of which were made between 8:00 p.m. and 10:00 pm – the time period which encompassed the robbery. DeSoto called Nuñez four times and Nuñez called DeSoto seven times; DeSoto also paged Nuñez a total of eight times that day. There were no calls between the two men the day before the robbery.

After Nuñez arrived at the scene of the planned robbery, he parked his marked patrol car on the corner near Mazarra's home. According to Castillo, Nuñez had arrived "at the last minute because he was involved with the surveillance with the patrol car."[6]

Garcia explained that "[a]s soon as she [Mazarra] drove into like a parking spot there, I was speeding, but then I slowed down to give my codefendant [Castillo] a chance to step out of the vehicle and grab the purse or whatever it was she was with, and run back to the car." Castillo approached Mazarra, grabbed the bag from her, and got back in Garcia's car as it sped off.

Mazarra explained that she had been carrying approximately $2,000, which consisted of the proceeds from lottery ticket sales money and bakery sales, as well as her

---

[6] Nunez had just finished responding to a brief police call regarding an assault immediately before he participated in the Mazarra robbery. Nunez spent about 10-15 minutes with the victim, but declined to investigate the case, even though she had given him part of the license plate number of the car involved in the assault, stating that "all tags were the same."

telephone and income tax paperwork. While she was driving home from the bakery, she noticed a police car with its lights on parked at the corner near her home. After she was robbed, Mazarra began running toward the police car, but the police car sped off without turning its lights on. Mazarra, however, was not able to get a good look at the person inside the police car.

After robbing Mazarra, Garcia, Nuñez, Castillo, and DeSoto met to divide the proceeds. Nuñez soon stated, however, that he had to leave because he was on duty that evening. DeSoto later gave Nuñez $125.00 – his share of the robbery proceeds.

Thwarted February 19, 2000, Trailer Home Robbery

Defendant Nuñez also worked an extra-duty evening job at a K-Mart store in Hialeah. While employed there, he learned about a woman who lived in a trailer home who had won a $3.5 million lottery. According to DeSoto, "Nuñez had been telling us for a long time that he knew this lady who works at K-Mart that has a friend who had some lottery money, over $100,000 and that she had – she was planning to keep the money in the trailer, in the trailer home and that she even went to K-Mart and purchased a safe." Nuñez also claimed that the woman did not keep the lottery winnings in a bank because "she was afraid of a computer failure of the year 2000."

Based on Nuñez's information, the group formulated the following robbery plan. The men would wait for the occupants to leave the trailer and Castillo and Garcia would burglarize the trailer while Nuñez and DeSoto acted as lookouts.

Cellular telephone and pager records showed that DeSoto had paged Nuñez eight times on February 19, 2000, and that he called Nuñez from his cellular telephone once on that date. On the same date, Nuñez called DeSoto thirteen times. Several of the calls were made between 9:30 p.m. and 10:00 p.m., during the time that the police had detained Garcia and Castilla. There were no documented calls between DeSoto and Nuñez on the two days before the thwarted robbery.

The group waited for the occupants to leave the trailer. While Nuñez was watching the trailer, DeSoto, Garcia, and Castilla were in their cars at a nearby shopping center. After some time, DeSoto, conducted another drive-by of the trailer and briefly stopped to speak with Nuñez.

However, Garcia and Castillo were approached by Miami-Dade police and asked what they were doing in the area. At first, Garcia told the officers that they had been waiting for some "girls." However, Garcia quickly changed his story and claimed that his car had been overheating.

When DeSoto drove back toward the shopping center, he noticed that an undercover officer had detained Castillo and Garcia. The detectives later arrested Garcia and Castillo and seized a sparkplug, pepper spray, a police badge, a walkie talkie, and a screw driver. The seized pepper spray was the same spray that Garcia used during the robbery of the 7-Eleven store manager.

DeSoto kept driving south and was later stopped by three undercover officers. The police did not notice Nuñez nearby, and DeSoto did not tell them about Nuñez.

Nuñez's Arrest

ATF Agent Thomas Chittum arrested Defendant Nuñez in October 2001. After his arrest, Defendant Nuñez claimed that DeSoto had "told him about things before, but that he [Nuñez] advised Mr. DeSoto against those things." Later, Nuñez laughed when Agent Chittum activated his car's child-safety lock to prevent Nuñez from trying to escape. When Agent Chittum told Nuñez that the lock activation was not personal, Nuñez responded, "no, you just never see yourself on this side." Nuñez further claimed, "I always thought [that] if I would be here, it would [be] for one million dollars not for something petty."

B. Nuñez's Defense

Nuñez's defense was primarily that the three other men were lying about his involvement and Nuñez sought to impeach their testimony. According to Nuñez, the three other men (DeSoto, Castillo, and Garcia) had started committing crimes together in 1996 – earlier than they had admitted to at trial. Nuñez wished to call his proposed, unnamed witness (later identified as Julio Pintado) to impeach all three of the government's witnesses on that point.[7] For example, Nuñez desired to call a witness to contradict DeSoto's statement that he (DeSoto) did not commit any crimes until he was suspended from the police force.

---

[7] Nunez also advised the court that he had the detective who would contradict Garcia's version of some of the events Garcia testified about. However, these events did not involve Nunez. In fact, Nunez conceded that the matter was collateral and was relevant because the proposed testimony went "to the very core of impeaching one of the three material witnesses in this case." Nunez does not challenge the exclusion of this testimony on appeal.

At trial, the government sought to exclude Nuñez from calling "witness(es) who will allege or accuse government witnesses of criminal behavior other than that admitted by the witnesses while they testified." In response to the government's motion, Nuñez clarified that he sought to introduce the testimony not only for the purpose of establishing that Garcia, Castillo, and DeSoto were lying, but also to show that they had "the ability, the wherewithal to set up this defendant." The following colloquy then occurred:

> THE COURT: Is that an entrapment defense?
>
> [NUÑEZ'S COUNSEL]: No. It is not an entrapment defense.
>
> THE COURT: I don't know what other purpose we have then.
>
> [NUÑEZ'S COUNSEL]: It goes to their credibility.

After the district court advised defense counsel that such evidence would be prohibited by Rule 608, Nuñez again requested that the testimony be admitted because the witness "tie[d] all three together, has been involved in personally, [had] conversations with them personally" and his testimony was "just so significant in terms of tying these witnesses together in criminal activity that they deny."[8] The district court prohibited the testimony of the witness (Julio Pintado).

Nuñez then called five witnesses. The first witness, a patrol officer with the Hialeah police department, provided

---

[8] Although defense counsel indicated that he would submit a written proffer, he did not do so until after trial.

evidence of Nuñez's good character and testified generally about the Hialeah police department report generation process and its timing. The second witness, a physician, testified that he treated Nuñez for a gluteal abscess on January 28, 2000, and described the physical limitations associated with the abscess. The third witness, a patrol officer with the Hialeah police department provided character evidence and testified that (1) he had not heard of officers possessing extra sets of keys to patrol vehicles and (2) taking a patrol vehicle without the supervisor's knowledge "would be almost impossible." The fourth and fifth witnesses provided an alibi for Nuñez for the February 19, 2000 attempted robbery of the trailer park.

Nuñez then sought to call Sergio Velasquez. During the government's case-in-chief, DeSoto testified that Nuñez had told him that he (Nuñez) had advised Velasquez about the restauranteur robbery. Nuñez indicated that Velasquez would testify that he: (1) did not know that Nuñez was committing crimes; (2) would have turned Nuñez in if he was committing crimes; and (3) was not available to cover for Nuñez. The government contended that Velasquez's testimony could be offered only to impeach DeSoto's testimony, a purpose barred by Rule 608. The district court sustained the objection, reasoning that the testimony was "not admissible in the first instance" and did "not achieve more than what its intended purpose was to contradict or impeach DeSoto based on what DeSoto's own testimony was."

Nuñez's Motion for a New Trial

After the jury returned a guilty verdict, Nuñez filed a renewed motion for judgment of acquittal or, in the

alternative, for a new trial. In his motion, Nuñez argued that the district court erred when excluding the testimony of Julio Pintado, the witness who was the subject of the government's motion in limine at trial. Nuñez proffered that Pintado would have testified that Pintado and DeSoto began committing crimes in 1986, long before DeSoto testified that he was involved in criminal activity. Pintado also would have testified that Garcia and Castillo, contrary to their testimony at trial, knew DeVarona, and that Pintado believed that Garcia, Castillo, and DeSoto implicated Nuñez to protect DeVarona. Nuñez did not specifically request a hearing on his motion for a new trial.

Subsequently, on September 11, 2002, Nuñez filed a "supplement" to his motion for judgment of acquittal or, in the alternative, for a new trial. According to the supplement, an inmate at the Federal Detention Center ("FDC") had exculpatory information regarding Nuñez's involvement.

According to inmate Rafael Olivares: (1) he was serving a term of nine years' imprisonment for credit card fraud; (2) he was Garcia's cellmate at the FDC; (3) Garcia had advised Olivares "that he [had] participated in a plan to falsely implicate Cecilio Nuñez with crimes he (Garcia) committed with Juan Castillo and Orestes DeSoto" and Nuñez was not involved with the crimes; (4) Garcia had advised him that he, Castillo, and DeSoto included Nuñez in their crimes to receive consideration at sentencing for assisting the government; (5) Garcia stated that, although they knew that he was a "good cop," DeSoto had called Nuñez during the commission of the crimes to set Nuñez up; and (6) Garcia had advised him that he, Castillo, and DeSoto "would communicate through tube in the toilet" at

the FDC. Again, Nuñez did not specifically request a hearing on his motion for a new trial.

Nuñez's Sentencing

At the sentencing hearing, Nuñez attempted to raise the supplemental motion for new trial, and the following colloquy occurred:

> [NUÑEZ'S COUNSEL]: Judge, if I could, I would like to take up the motion for new trial. The Court –
>
> [THE COURT]: Not now. We're not going to have argument on it. Let's take up the objections to the presentence investigation report.
>
> [NUÑEZ'S COUNSEL]: Judge, if I could talk about what I just filed [the motion for a new trial]?
>
> [THE COURT]: I don't want oral argument on that now. If I need to, I will be happy to set it for hearing.
>
> [NUÑEZ'S COUNSEL]: Okay. I would ask that you do that then, Judge, because that's essentially a supplement to the motion and I would ask the Court to consider that. If the Court wants to set oral argument on it, I would ask –
>
> [THE COURT]: Let's get to the objections [to the PSR]:

After a brief discussion of the objections to the PSR, Nuñez's counsel again raised the issue of the motion for a new trial, and the following colloquy occurred:

> [NUÑEZ'S COUNSEL]: I guess if I was to ask the Court to do anything, I would ask the Court

> to defer sentencing until the Court has the opportunity to consider the impact on this individual of a motion for a new trial based on the cumulative nature of everything.
>
> And I would also want the government to fully investigate what this man is saying, you know, because this man quite frankly doesn't have any motive to – I would urge the government to do that rather than proceed with sentencing. I don't know if the Court is inclined to do that.
>
> Quite frankly, that would have been what I would think appropriate based on this gentleman.
>
> Judge, I really – all I can say is, Judge, I still unfortunately, unfortunately, believe that my client is innocent in this case. That's a very difficult thing for me.
>
> [COURT]: Does he wish to say anything on his own behalf?
>
> [NUÑEZ'S COUNSEL]: No, sir.

After the district court ordered Nuñez to serve aggregate term of 272 months' imprisonment, to be followed by a term of 5 years' supervised release, Nuñez's counsel again raised the issue of the motion for a new trial, and stated, "I would ask the Court, if the Court would, after reviewing that pleading this morning, if the Court desires to set a hearing, I would welcome it." The district court responded, "All right. We will consider it."

Following the entry of the judgment and Nuñez's filing of a notice of appeal, however, the district court summarily denied Nuñez's motion for a new trial without

a hearing, summarily stating, "The Court having considered the record, and having reviewed the Defendant's motions and supplement and the Government's response thereto, it is ORDERED AND ADJUDGED that the Defendant's Motions are hereby DENIED."

II. DISCUSSION

On appeal, Nuñez contends that the district court abused its discretion when (1) excluding the testimony of two of his proposed defense witnesses – Pintado and Velasquez – and (2) denying Nuñez's motion for a new trial, based on newly discovered evidence, without conducting an evidentiary hearing.[9] For the following reasons, we affirm in part, and vacate and remand in part.

A. Julio Pintado

On appeal, Nuñez contends that the district court erroneously determined that Pintado's testimony was prohibited under Rule 608.[10] We disagree because Nuñez's defense counsel offered Pintado's testimony at trial *only* to impeach a witness's credibility through extrinsic evidence

---

[9] On appeal, Nunez attempts to characterize the exclusion of Pintado and Velasquez as constitutional violations. However, the district court did not prohibit Pintado or Velasquez from testifying altogether. Rather, the district court merely limited the scope of their proposed testimony. *See, e.g., United States v. Sheffied,* 992 F.2d 1164, 1167 (11th Cir. 1993) ("We review the curtailment of cross examination [and] the admissibility of evidence to attack the credibility of a witness under the 'abuse of discretion' standard," (brackets in original, and citation and quotation marks omitted)).

[10] We review the district court's determinations, where preserved, under Rule 608 for an abuse of discretion. *United States v. Van Dorn,* 925 F.2d 1331, 1335 (11th Cir. 1991).

of prior bad acts. *See United States v. Castro.* 89 F.3d 1443, 1458 (11th Cir. 1996) (stating "[s]pecific instances of prior bad acts may not be admitted through extrinsic evidence to attack a witness's credibility").[11]

The colloquy at trial reveals that Nuñez intended to call an unnamed witness (Pintado) to impeach the credibility of the government's witnesses by showing that they were engaged in criminal conduct in 1986 – long before the criminal conduct to which they admitted at trial. Essentially, Nuñez wished to call Pintado to attack the government's witnesses' truthfulness regarding when they first engaged in criminal activity. Because this issue is not material to Nuñez's case and merely amounts to an attempt to impeach the witnesses' credibility through extrinsic evidence of prior bad acts, we agree with the district court that Pintado's testimony would have violated Rule 608. Consequently, it was properly excluded. *See Castro,* 89 F.3d at 1458.

In his motion for a new trial and in his appellate brief, Nuñez expanded upon his offer of proof at trial. Specifically, Nuñez proffered that Pintado would have testified not only that he and DeSoto began committing crimes in 1986, but also that Garcia and Castillo, contrary to their testimony at trial, knew Officer Carlos DeVarona, and that Pintado believed that Garcia, Castillo, and DeSoto implicated Nuñez to protect Officer DeVarona.

---

[11] Fed. R. Evid. 608(b) Prohibits a party from introducing extrinsic evidence of prior misconduct merely to impeach the general credibility of a witness. . . ." *United States v. Calle,* 822 F.2d 1016, 1021 (11th Cir. 1987).

This proffer and related arguments, however, were not raised before the district court at trial and, therefore, we do not consider them concerning Pintado. This Court has stated that, when the district court is confronted with an evidentiary objection, "[a]n offer of proof serves dual functions: (1) informing the court and opposing counsel of the precise substance of the evidence in question, enabling them to take appropriate action; and (2) perfecting the record for appellate review." *United States v. Baptista-Rodriguez,* 17 F.3d 1354, 1372 n.27 (11th Cir. 1994). This Count has further stated that "the propriety of a decision to exclude evidence will not be reviewed if an offer of proof was not made at trial." *United States v Vitale*, 596 F.2d 688, 690 (5th Cir 1979).[12]

B. Sergeant Sergio Velasquez

On appeal, Nuñez also contends that Velasquez could have disproved DeSoto's testimony that Nuñez had confessed the crimes to Velasquez. This was the same basis on which Nuñez sought to admit Velasquez's testimony in the district court.[13]

As described above, DeSoto testified on behalf of the government during direct examination that Nuñez had told him that he (Nuñez) had informed Velasquez about one of the robberies. As such, the government was able to

---

[12] Decisions by the former Fifth Circuit issued before October 1, 1981, are binding as precedent in this Court. *See Bonner v. City of Prichard,* 661 F.2d 1206; 1207 (11th Cir. 1981) (*en banc*).

[13] We review the district court's determinations, where preserved, under Rule 608 for an abuse of discretion. *United States v. Van Dorn*, 925 F.2d 1331, 1335 (11th Cir. 1991).

place in the jury's mind that Nuñez was confessing his involvement in the criminal enterprise to Velasquez.

"Fed. R. Evid. 608(b) prohibits a party from introducing extrinsic evidence of prior misconduct merely to impeach the general credibility of a witness. . . . " *United States v. Calle*, 822 F.2d 1016, 1021 (11th Cir. 1987). However, despite the prohibition of Rule 608(b), extrinsic evidence should be admitted "where it is introduced to disprove a specific fact material to the defendant's case." *Id.* at 1021; *see United States v. Cardenas,* 895 F.2d 1338, 1345 (11th Cir. 1990). ("However, Rule 608(b) should not stand as a bar to the admission of evidence introduced to contradict, and which the jury might find disproves, a witness's testimony as to a material issue of the case." (citations and internal quotation marks omitted)).

In this case, the district court abused its discretion when excluding Velasquez's testimony. Although Velasquez's testimony would have impeached DeSoto's credibility, it also would have made it less likely that Nuñez had confessed to committing the restauranteur robbery – a specific fact material to Nuñez's case. Consequently, the district court should have admitted the testimony. Although the district court erroneously excluded Velasquez's proposed testimony, reversal is not warranted because the error was harmless in light of the substantial evidence adduced at trial of Nuñez's guilt. *See United States v. Hubert,* 138 F.3d 912, 914 (11th Cir. 1998) (error is harmless if there is overwhelming evidence of defendant's guilt).

At trial, Garcia, Castillo, and DeSoto all testified that Nuñez was a co-conspirator who participated in the robberies in question. Furthermore, the government introduced corroborating evidence concerning the large

amount of telephone and pager contacts between Nuñez and DeSoto on the days of the planned robberies. Finally, the government introduced Nuñez's own incriminating statements after he was arrested. Consequently, we conclude that this evidentiary error was harmless in light of the substantial evidence of Nuñez's guilt.

C. Motion for a New Trial

Nuñez also contends that the district court abused its discretion when denying his motion for a new trial and that, in any event, the district court should have held an evidentiary hearing on the "supplement" to his motion for new trial before ruling on the motion.[14] Nuñez notes that the substance of inmate Olivares's testimony was material to Nuñez's guilt and was consistent with the theory of his defense. Nuñez contends that, in juxtaposition with the testimony of Pintado and Velasquez, a different result "would not only have been 'likely' but inevitable."

In order to merit a new trial, the defendant must show that: (1) the evidence was in fact discovered following trial; (2) the defendant exercised due care to discover the evidence; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is of such nature that a new trial would probably produce a different result. *United States v. Lee,* 68 F.3d 1267, 1273 (11th Cir. 1995).

---

[14] We review the district court's disposition of a motion for new trial for an abuse of discretion. *United States v. Martinez,* 763 F.2d 1297, 1312 (11th Cir. 1985). In addition we review "the district court's denial of an evidentiary hearing for abuse of discretion." *United States v. Massey,* 89 F.3d 1433, 1443 (11th Cir. 1996).

The district court's one-sentence, summary denial of Nuñez's motion for a new trial makes it impossible for this Court to determine on what basis the district court concluded that a new trial was not warranted. Because it is more appropriate for the district court to determine the merits of Nuñez's motion for a new trial in the first instance, we vacate the district court's denial of the motion and remand this case to the district court for further proceedings.

Given that the issue of whether an evidentiary hearing is warranted in this case will undoubtedly arise on remand, we also address Nuñez's argument on appeal that he is entitled to an evidentiary hearing on his motion for a new trial.[15]

In *United States v. Yizar,* 956 F.2d 230, 234 (11th Cir. 1992), this Court remanded a case for an evidentiary hearing and stated that: "We simply hold that Yizar has made sufficient allegations so that it cannot be conclusively stated that he is entitled to no relief, and thus an evidentiary hearing must be held."

Furthermore, in *United States v. Fernandez,* 136 F.3d 1434, 1438-1439 (11th Cir. 1998), we stated that when the government's case is based almost exclusively on the testimony of co-conspirators, as it was in this case, an evidentiary hearing is warranted if the newly discovered

---

[15] We recognize that there is debate as to whether Nunez's counsel actually requested an evidentiary hearing before the district court. Although it is true that Nunez's counsel never uttered the word "evidentiary," we conclude that a fair reading of the sentencing hearing indicates that is what Nunez's counsel was requesting.

evidence is relevant and responsive directly to the defense at trial. This Court stated the following:

> Although the government presented a formidable case against Fernandez at trial, it was based almost exclusively on the testimony of co-conspirators. While the uncorroborated testimony of co-conspirators can be sufficient to support a conviction, *see United States v. Broadwell*, 870 F.2d 594, 601 (11th Cir. 1989), our inquiry at this stage is whether evidence of the CIA's possible link to the very drug shipments at issue in this case either reasonably might have affected the outcome of the proceeding or, in the alternative, would likely produce a different result if the case were retried. . . . At this stage, it is impossible to discern whether the addition of evidence of a possible CIA-link to this case would have completed the puzzle and thereby created for the jury reasonable doubt or whether, as the district court determined, the evidence was merely cumulative. In light of the fact that the government's case against Fernandez was based almost exclusively on the testimony of co-defendants, however, and because the allegations potentially implicating the CIA are responsive directly to the defense that Fernandez attempted to present, we conclude that these allegations are, at the very least, significant enough to permit Fernandez to present his case at a hearing.

Id.

In this case, we conclude that Nuñez's allegations are sufficient enough to permit him to present inmate Olivares at an evidentiary hearing. His proposed theory at trial was that DeSoto, Castillo, and Garcia were lying and that they were protecting another police officer. There is no debate

that the information obtained from inmate Olivares was obtained after trial through the exercise of due diligence and relates directly to Nuñez's theory of defense.

We do not pretermit the outcome of the hearing on the motion for a new trial. Rather, we simply conclude that Nuñez has provided sufficient information to be entitled to an evidentiary hearing. Furthermore, an evidentiary hearing will also afford "the court a necessary opportunity to further examine [the] defendant's claim that the affidavit offered newly discovered evidence, and to more fully evaluate whether the criteria applicable to [such] a motion . . . had been satisfied." *United States v. Culliver*, 17 F.3d 349, 350-51 (11th Cir. 1994). Consequently, we vacate the district court's denial of Nuñez's motion for a new trial and remand this case for an evidentiary hearing on Nuñez's motion for a new trial.[16]

III. CONCLUSION

For all the above reasons, we affirm Nuñez's convictions, but vacate the denial of his motion for a new trial and remand this case for an evidentiary hearing on his motion for a new trial.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

---

[16] We leave it to the parties to argue, and the district court to decide in the first instance, what effect the improper exclusion of Velasquez's testimony has on the motion for a new trial.

United States District Court
Southern District of Florida
MIAMI DIVISION

(Filed Sep. 11, 2002)

UNITED STATES OF AMERICA v. CECILIO NUNEZ	JUDGMENT IN A CRIMINAL CASE (For Offenses Committed On or After November 1,1987) Case Number: 1:O1CR00981-002-MOORE Counsel For Defendant Samuel Rabin. Esq. Counsel For The United States: Beth Sreenan Court Reporter: Sally Rice

The defendant was found guilty an Count(s) 2,3,5,7 and 8 of the indictment.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

TITLE/ SECTION NUMBER	NATURE OF OFFENSE	DATE OFFENSE CONCLUDED	COUNT
18:1951(a)	Conspiracy to obstruct, delay and affect com-merce by robbery by means of actual and threatened force, vio-lence and fear of injury	May 2001	2
18:924(o)	Conspiracy to use, carry, brandish and possess a firearm during a crime of	May 2001	3

	violence and drug trafficking crime		
18:1951(a) and 2	Unlawfully obstructing commerce by robbery by means of actual and threatened force, violence and fear of injury	2/15/00	5 and 8
18:924(c)(1)(A)(i), (A)(ii) and 2	Using a firearm during and in relation to a crime of violence and drug trafficking crime	2/5/00	7

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) 1 and 6.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No. 266-77-9840
Defendant's Date of Birth: 8/24/62
Deft's U.S. Marshal No.: 67895-004

Defendant's Mailing Address:
In custody

Defendant's Residence Address:
In custody

Date of Imposition of Sentence:
September 11, 2002

/s/ K.M. Moore
K. MICHAEL MOORE
United States District Judge

September 11th, 2002

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 188 Months as to each of Counts 2, 3, 5 and 8, to run concurrently with each other, and 84 Months as to Count 7, to run consecutive to Counts 2, 3, 5 and 8.

The Court makes the following recommendations to the Bureau of Prisons:

Confinement in the southern area of Florida, as close to his family as possible.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By: _____

Deputy U.S. Marshal

* * *

[1] IN THE DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 01-981-CR-MOORE

UNITED STATES OF AMERICA,
Plaintiff,

MIAMI, FLORIDA

vs.

SEPTEMBER 11, 2002

CECILIO NUNEZ,
Defendant.

SENTENCING HEARING

BEFORE THE HONORABLE K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

Appearances:

MS. ELIZABETH SREENAN, AUSA
U. S. Attorney's Office
99 NE 4th Street
Miami, FL 33132
Appearing for the Government

SAM RABIN JR., ESQ.
2400 South Dixie Highway, Ste. 200
Miami, FL 33133
Appearing for the Defendant

[2] September 11, 2002.

PROCEEDINGS

THE COURT: Please be seated.

MS. RUIZ: United States v. Cecilio Nunez. Please state your appearances.

MS. SREENAN: Good morning, Your Honor. Beth Sreenan on behalf of the United States. Present with me are Special Agent Tom Chitham and Detective Mike Leon.

MR. RABIN: Good morning, Your Honor. Sam Rabin on behalf of Cecilio Nunez, who is present with me at counsel table.

THE COURT: Okay. Before we get started with sentencing, I'll deny your motion for judgment of acquittal.

Do you want to take up any objections to the presentence investigation report?

MR. RABIN: Judge, if I could, I would like to take up the motion for new trial. The Court –

THE COURT: Not now. We're not going to have argument on it. Let's take up the objections to the presentence investigation report.

MR. RABIN: Judge, if I could talk about what I just filed?

THE COURT: I don't want oral argument on that now. If I need to, I will be happy to set it for hearing.

MR. RABIN: Okay. I would ask that you do that then, Judge, because that's essentially a supplement to the motion and I [3] would ask the Court to consider that. If the Court wants to set oral argument on it, I would ask –

THE COURT: Let's get to the objections.

MR. RABIN: Judge, we filed one objection, which relates to the inclusion of the first offense in my client's guideline calculation. The impact on it, I think, is

not significant, quite frankly, I think it is a level, if I'm not mistaken. But it is my recollection that the testimony varied greatly as to whether he had anything to do with that offense. But the physical evidence, if you will, the evidence that should have existed according to the testimony of the witnesses did not exist.

And I believe that instead of proving that he was in some way involved, not only did they not prove it but the government essentially conceded that the reason he wasn't charged with this was because they didn't have evidence of it. Yet the government comes back now essentially and continues to maintain the position that there is sufficient evidence to include it in the PSI. We would argued [sic] to the jury that he wasn't charged with it because there was no evidence he was involved in it really. I would say, quite frankly, that it's error to include it. I wish it had more of an effect on his guideline calculations, quite frankly. But based upon the testimony and based upon the evidence, it's an error to include it.

THE COURT: Okay. I have considered the objection and also the response of the government and the probation officer's [4] response. I'll note the objection and deny it. I am satisfied that for purposes of the guideline calculations and the burden on the government to establish that conduct by a preponderance of the evidence that it's been properly considered and should be part of the guideline calculation. I will note the objection and deny it.

Any other objections?

MR. RABIN: Judge, that was our only objection.

THE COURT: I have a guideline calculation of 151 to 188 months; is that correct.

MS. SREENAN: Yes, Your Honor, plus a 60-month consecutive. I'm sorry, seven years consecutive.

THE COURT: Pardon me?

MS. SREENAN: It's a seven year consecutive instead of 60 because of the brandishing of a firearm.

THE COURT: Eighty-four months, correct? Is that right?

PROBATION OFFICER: That's correct, Your Honor.

THE COURT: Okay. All right. Anything on behalf of the defendant? Does the defendant wish to be heard before sentence is imposed?

MR. RABIN: Judge, I have a number of family members here. It is generally not my practice to engage in a lengthy sentencing hearing, and I don't know if the Court is inclined to at least as to the guideline calculations give him the low end of the guidelines as the Court perceives the guidelines. If it is, then I'm not going to present any testimony of witnesses.

[5] THE COURT: Well, I'm not going to bargain with you.

MR. RABIN: I'm not bargaining with you.

THE COURT: They're welcome to speak. This is their opportunity to speak. I don't want to discourage them in any way from doing that.

By the way, I will tell you that I received a stack of letters regarding the defendant. I've read them all,

considered them, and I'm happy to hear from whoever wants to speak.

MR. RABIN: Judge, I would just say that there are a large number of people that have contacted me about this defendant for, during, and after this trial. There have always been very nagging concerns that I have had as to why things didn't happen or didn't fit in the way the – I figured they would, had I believed that the evidence was going clear my client committed these crimes.

And, quite frankly, this is a very troubling case for me. It's troubling based on the evidence, it's troubling based on the verdicts, and it's now even more troubling based on this new affidavit that I have provided to the Court this morning.

I guess if I was to ask the Court to do anything, I would ask the Court to defer sentencing until the Court has the opportunity to consider the impact on this individual of a motion for new trial based on the cumulative nature of everything.

And I would also want the government to fully investigate what this man is saying, you know, because this man [6] quite frankly doesn't have any motive to – I would urge the government to do that rather than proceed with sentencing. I don't know if the Court is inclined to do that.

Quite frankly, that would have been what I would think appropriate based on this gentleman.

Judge, I really – all I can say is, Judge, I still unfortunately, unfortunately, believe that my client is innocent in this case. That's a very difficult thing for me.

THE COURT: Does he wish to say anything on his own behalf?

MR. RABIN: No, sir.

THE COURT: Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, Cecilio Nunez, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 188 months as to Counts Two, Three, Five and Eight, and 84 months as to Count Seven, to run consecutively to Counts Two, Three, Five and Eight. I order that the defendant jointly and severally make restitution in the amount of $22,169.93 to the victims contained – set forth in the presentence investigation report. Restitution is payable immediately.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of five years as to Count Seven and three years as to Counts Two, Three, Five and Eight, to run concurrently. Within 72 hours of release from the custody of [7] the Bureau of Prisons, the defendant shall report in person to the probation office in the district in which he is released.

While on supervised release, the defendant shall not commit any federal, state, or local crimes; shall be prohibited from possessing a firearm or other dangerous device, and shall not possess a controlled substance.

In addition, he shall comply with the standard conditions of supervised release that have been adopted by this Court and the following special conditions:

The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to United States Probation Office.

It's further ordered that the defendant is assessed $100 as to each Count Two, Three, Five, Seven and Eight, for a total of $500, which shall be due immediately.

Total sentence, 188 months' incarceration as to Counts Two, Three, Five and Eight, and 84 months as to Count Seven, to run consecutively to Counts Two, Three, Five and Eight; $22,169.93 restitution; and a $500 special assessment; and five years' supervised release.

Now that sentence has been imposed, does the defendant or his counsel object to the Court's finding of fact and to the manner in which sentence was pronounced?

MR. RABIN: Judge, we do, based on the objections already made.

[8] THE COURT: Mr. Nunez, do you understand you have a right to appeal the sentence that I have imposed?

THE DEFENDANT: Yes, sir, I do.

THE COURT: Anything further?

MS. SREENAN: No, Your Honor. Thank you.

MR. RABIN: I would ask the Court, if the Court would, after reviewing that pleading this morning, if the Court desires to set a hearing, I would welcome it.

THE COURT: All right. We will consider it.

MR. RABIN: Thank you, sir.

THE COURT: Thank you.

(Which concluded the proceedings.)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-10463-HH

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CECILIO NUNEZ,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Florida

---

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC (Opinion _____, 11th Cir., 19__, ___ F.2d ___).

(Filed Nov. 19, 2004)

Before: ANDERSON, HULL and WILSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Hull
UNITED STATES CIRCUIT JUDGE

CONSTITUTIONAL, STATUTORY, PROVISIONS, AND GOVERNING SENTENCING GUIDELINES

Amendment V to the Constitution of the United States is as follows:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property be taken for public use, without just compensation

---

Amendment VI to the Constitution of the United States is as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of his Counsel for his defense.

SENTENCING STATUTES

§2B3.1. Robbery

(a) Base Offense Level: **20**

(b) Specific Offense Characteristics

(1) If the property of a financial institution or post office was taken, or if the taking of such property was an object of the offense, increase by **2** levels.

(2)(A) If a firearm was discharged, increase by **7** levels; (B) if a firearm was otherwise used, increase by **6** levels; (C) if a firearm was brandished or possessed, increase by **5** levels; (D) if a dangerous weapon was otherwise used, increase by **4** levels; (E) if a dangerous weapon was brandished or possessed, increase by **3** levels; or (F) if a threat of death was made, increase by **2** levels.

(3) If any victim sustained bodily injury, increase the offense level according to the seriousness of the injury:

Degree of Bodily Injury	Increase in Level
(A) Bodily Injury	add **2**
(B) Serious Bodily Injury	add **4**
(C) Permanent or Life-Threatening Bodily Injury	add **6**
(D) If the degree of injury is between that specified in subdivisions (A) and (B),	add **3** levels; or
(E) If the degree of injury is between that specified in subdivisions (B) and (C),	add **5** levels.

Provided, however, that the cumulative adjustments from (2) and (3) shall not exceed **11** levels.

(4)(A) If any person was abducted to facilitate commission of the offense or to facilitate escape, increase by **4** levels; or (B) if any person was physically restrained to facilitate commission of the offense or to facilitate escape, increase by **2** levels.

(5) If the offense involved carjacking, increase by 2 levels.

(6) If a firearm, destructive device, or controlled substance was taken, or if the taking of such item was an object of the offense, increase by 1 level.

(7) If the loss exceeded $10,000, increase the offense level as follows:

Loss (Apply the Greatest)	Increase in Level
(A) $10,000 or less	no increase
(B) More than $10,000	add 1
(C) More than $50,000	add 2
(D) More than $250,000	add 3
(E) More than $800,000	add 4
(F) More than $1,500,000	add 5
(G) More than $2,500,000	add 6
(H) More than $5,000,000	add 7.

(c) Cross Reference

(1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder).

---

§3A1.1. Hate Crime Motivation or Vulnerable Victim

(a) If the finder of fact at trial or, in the case of a plea of guilty or nolo contendere, the court at sentencing determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense of conviction because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person, increase by 3 levels.

(b)(1) If the defendant knew or should have known that a victim of the offense was a vulnerable victim, increase by 2 levels. (2) If (A) subdivision (1) applies; and (B) the offense involved a large number of vulnerable victims, increase the offense level determined under subdivision (1) by 2 additional levels.

(c) Special Instruction (1) Subsection (a) shall not apply if an adjustment from §2H1.1(b)(1) applies.

---

§3B1.3. Abuse of Position of Trust or Use of Special Skill

If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels. This adjustment may not be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristic. If this adjustment is based upon an abuse of a position of trust, it may be employed in addition to an adjustment under §3B1.1 (Aggravating Role); if this adjustment is based solely on the use of a special skill, it may not be employed in addition to an adjustment under §3B1.1 (Aggravating Role).

---

§3D1.2. Groups of Closely Related Counts

All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:

(a) When counts involve the same victim and the same act or transaction.

(b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.
(c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.
(d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior,

Offenses covered by the following guidelines are to be grouped under this subsection:

§§2B1.1, 2B1.4, 2B1.5, 2B4.1, 2B5.1, 2B5.3, 2B6.1;
§§2C1.1, 2C1.2, 2C1.7, 2C1.8;
§§2D1.1, 2D1.2, 2D1.5, 2D1.11, 2D1.13;
§§2E4.1, 2E5.1;
§§2G2.2, 2G3.1;
§2K2.1;
§§2L1.1, 2L2.1;
§2N3.1;
§2Q2.1;
§2R1.1;
§§2S1.1, 2S1.3;
§§2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.9, 2T2.1, 2T3.1.

Specifically excluded from the operation of this subsection are: all offenses in Chapter Two, Part A;

§§2B2.1, 2B2.3, 2B3.1, 2B3.2, 2B3.3;
§2C1.5;
§§2D2.1, 2D2.2, 2D2.3;
§§2E1.3, 2E1.4, 2E2.1;

§§2G1.1, 2G2.1;
§§2H1.1, 2H2.1, 2H4.1;
§§2L2.2, 2L2.5;
§§2M2.1, 2M2.3, 2M3.1, 2M3.2, 2M3.3, 2M3.4, 2M3.5, 2M3.9;
§§2P1.1, 2P1.2, 2P1.3;
§2X6.1.

For multiple counts of offenses that are not listed, grouping under this subsection may or may not be appropriate; a case-by-case determination must be made based upon the facts of the case and the applicable guidelines (including specific offense characteristics and other adjustments) used to determine the offense level.

Exclusion of an offense from grouping under this subsection does not necessarily preclude grouping under another subsection.

SD/FL PACTS #: 70439

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA	**) PRESENTENCE**
	) INVESTIGATION
v.	**) REPORT**
CECILIO BARTOLOME NUNEZ	**) Docket No.**
	) 01-981-CR-MOORE
	)
	) Defendant No. 02
	) Guideline Manual:
	) 2001

Prepared for: The Honorable K Michael Moore
U. S. District Judge

Prepared by: Ricardo Garcia
U. S. Probation Officer
300 N.E. 1st Avenue, Room 315
Miami, FL 33132-2126
(305) 523-5342

Assistant U. S. Attorney
C.E. "Beth" Sreenan
8245 N.W. 53rd Street
Miami, FL 33166
(305) 597-2089

Defense Counsel
Samuel J. Rabin, Jr.
799 Brickell Plaza, Suite 606
Miami, FL 33131
(305) 358-1064
(305) 3372-1644 (Fax)

Sentence Date: June 6, 2002, Miami, Florida

Group One

January 13, 2000 Robbery

33. **Base Offense Level:** The guideline for a violation of 18 U.S.C. § 1951(a) is found in § 2B3.1(a). This section provides for a base offense level of 20 for an offense involving robbery. **20**

34. **Specific Offense Characteristics:** Pursuant to § 2B3.1(b)(3)(A), if any victim of the offense sustained bodily injury, the base offense level is increased by two additional levels. +2

35. **Specific Offense Characteristics:** Pursuant to § 2B3.1(b)(7)(B), if the loss was more than $10,000 but less than $50,000, the base offense level is increased by one additional level. +1

36. **Victim-Related Adjustments:** None 0

37. **Adjustment for Role in the Offense:** Pursuant to § 3B1.3, if the defendant abused a position of public trust in a manner that significantly facilitated the commission or concealment of the offense, the base offense level is increased by two levels. +2

38. **Adjustment for Obstruction of Justice:** None 0

39. **Adjusted Offense Level (subtotal):** 25

Group Two

February 5, 2000 Robbery

40. **Base Offense Level:** The guideline for a violation of 18 U.S.C. § 1951(a) is found in § 2B3.1(a). This section provides for a base offense level of 20 for an offense involving robbery. 20

41. **Specific Offense Characteristics:** Pursuant to § 2B3.1(b)(3)(A), if any victim of the offense sustained bodily injury, the base offense level is increased by two additional levels. +2

42. **Specific Offense Characteristics:** Pursuant to § 2B3.1(b)(4)(A), if any person was abducted to facilitate commission of the offense or to facilitate

escape, the base offense level is increased by four additional levels. +4

43. **Specific Offense Characteristics:** Pursuant to § 2B3.1(b)(5), if the offense involved carjacking, the base offense level is increased by two additional levels. +2

44. **Specific Offense Characteristics:** Pursuant to § 2B3.1(b)(6), if a controlled substance was taken, or if the taking of such item was an object of the offense, the base offense level is increased by one additional level. +1

45. **Specific Offense Characteristics:** Pursuant to § 2B3.1(b)(7)(B), if the loss was more than $10,000 but less than $50,000, the base offense level is increased by one additional level. +1

46. **Victim-Related Adjustments:** None 0

47. **Adjustment for Role in the Offense:** Pursuant to § 3B1.3, if the defendant abused a position of public trust in a manner that significantly facilitated the commission or concealment of the offense, the base offense level is increased by two levels. +2

48. **Adjustment for Obstruction of Justice:** None 0

49. **Adjusted Offense Level (subtotal):** 32

Group Three

February 15, 2000 Robbery

50. **Base Offense Level:** The guideline for a violation of 18 U.S.C. § 1951(a), is found in § 2B3.1(a). This guideline provides for a base offense level of 20 for an offense involving robbery. 20

51. **Specific Offense Characteristics:** None 0

52. **Victim Related Adjustment:** Pursuant to § 3A1.1(b)(1), if the defendant knew of should have known that a victim of the offense was a vulnerable victim, the base offense level is increased by two levels. +2

53. **Adjustment for Role in the Offense:** Pursuant to § 3B1.3, if the defendant abused a position of public trust in a manner that significantly facilitated the commission or concealment of the offense, the base offense level is increased by two levels. +2

54. **Adjustment for Obstruction of Justice:** None 0

55. **Adjusted Offense Level (subtotal):** 24

Group Four

February 19, 2000 Robbery

56. **Base Offense Level:** The guideline for a violation of 18 U.S.C. § 1951(a), is found in § 2B3.1(a). This guideline provides for a base offense level of 20 for an offense involving robbery. 20

57. **Specific Offense Characteristics:** None 0

58. **Victim Related Adjustment:** None 0

59. **Adjustment for Role in the Offense:** Pursuant to § 3B1.3, if the defendant abused a position of public trust in a manner that significantly facilitated the commission or concealment of the offense, the base offense level is increased by two levels. +2

60. **Adjustment for Obstruction of Justice:** None 0

61. **Adjusted Offense Level (subtotal):** 22

Multiple-Count Adjustment

		Units
62.	**Adjusted Offense Level for Group Two: 32**	**1**
63.	**Adjusted Offense Level for Group One: 25**	**1/2**
64.	**Adjusted Offense Level for Group Three: 24**	**1/2**
65.	**Adjusted Offense Level for Group Four: 22**	**0**
66.	**Total Number of Units:**	**2**
67.	**Greater Adjusted Offense Level:**	**32**
68.	**Increase in Offense Level:**	**+2**
69.	**Combined Adjusted Offense Level:**	**34**
70.	**Chapter Four Enhancement:**	**0**
71.	**Adjustment for Acceptance of Responsibility:** None	**0**
72.	**Total Offense Level:**	**33**

PART B. THE DEFENDANT'S CRIMINAL HISTORY

Juvenile Adjudication(s)

73. None

Adult Criminal Conviction(s)

74. None

Criminal History Computation

75. The defendant has zero criminal history points. According to the Sentencing Table (Chapter Five, Part A), zero criminal history points establish a criminal history category of I.

Other Criminal Conduct

76. None

Pending Charges

77. None

PART D. SENTENCING OPTIONS

Custody

102. **Statutory Provisions:** As to each of Counts Two, Five and Eight, the term of imprisonment is 0 to 20 years, 18 U.S.C. § 1951(a). As to Count Three, the term of imprisonment is 0 to 20 years, 18 U.S.C. § 924(o). As to Count Seven, the term of imprisonment is not less than seven years, to run consecutively to any other count of conviction, 18 U.S.C. § 924(c)(1).

103. **Guideline Provisions:** Based on a total offense level of 34 and a criminal history category of I, the guideline imprisonment range is 151 to 188 months.

Supervised Release

104. **Statutory Provisions:** As to each of Counts Two, Three, Five and Eight, if a term of imprisonment is imposed, the Court may impose a term of supervised release of not more than three years, 18 U.S.C. § 3583(a), (b)(2). As to Count Seven, a term of not more than five years supervised release is required if a sentence of imprisonment is imposed, 18 U.S.C. § 3583(a), (b)(1).

105. **Guideline Provisions:** Supervised release is required if the Court imposes a term of imprisonment of more than one year or when required by

statute, § 5D1.1(a). If a sentence of imprisonment of one year or less is imposed, a term of supervised release is optional, § 5D1.1(b). As to each of Counts Two, Three, Five and Eight, the guideline range for a term of supervised release is at least two years but not more than three years, § 5D1.2(a)(2). As to Count Seven, the guideline range for a term of supervised release is three to five years, § 5D1.2(a)(1), (b).

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 01 0981 CR-MOORE

21 U.S.C. §846
18 U.S.C. §924(c)(1)
18 U.S.C. §924(o)
18 U.S.C. §1951
18 U.S.C. §2

UNITED STATES OF AMERICA

v.

ORESTES DESOTO, and
CECILIO NUNEZ.

INDICTMENT

(Filed Oct. 26, 2001)

The Grand Jury charges that:

COUNT I

From a date unknown, but beginning at least in or about January 2000, through in or about May 2001, at Miami-Dade County, in the Southern District of Florida, and elsewhere, the defendants,

ORESTES DESOTO,
and
CECILIO NUÑEZ

did knowingly and intentionally combine, conspire, confederate, and agree with each other and with persons known and unknown to the Grand Jury, to possess with intent to distribute a Schedule II controlled substance, that is five (5) kilograms or more of a mixture and

substance containing a detectable amount of cocaine; in violation of Title 21, United States Code, Section 841(a)(1); all in violation of Title 2I, United States Code, Sections 846 and 841(b)(1)(A)(ii).

COUNT II

From a date unknown, but beginning at least in or about January 2000, through in or about May 2001, at Miami-Dade County, in the Southern District of Florida, and elsewhere, the defendants,

ORESTES DESOTO,
and
CECILIO NUÑEZ

did knowingly and intentionally combine, conspire, confederate and agree with persons known and unknown to the Grand Jury, to obstruct, delay and affect commerce and the movement of articles and commodities in commerce, by robbery, as the terms "commerce" and "robbery" are defined in Title 18, United States Code, Sections 1951(b)(1) and (b)(3), by unlawfully taking and obtaining property from the person of individuals known to the Grand Jury against the will of said individuals, and by means of actual and threatened force, violence and fear of injury to said individuals; in violation of Title 18, United States Code, Sections 1951(a).

COUNT III

From a date unknown, but beginning at least in or about January 2000, through in or about May 2001, at Miami-Dade County, in the Southern District of Florida, and elsewhere, the defendants,

ORESTES DESOTO,
and
CECILIO NUÑEZ

did knowingly and intentionally combine, conspire, confederate, and agree with each other and with persons known and unknown to the Grand Jury, to use and carry a firearm during and in relation to a crime of violence and a drug trafficking crime and to possess a firearm in furtherance of a crime of violence and a drug trafficking crime which are felonies prosecutable in a court of the United States, that is, violations of Title 18, United States Code, Section 1951(a) and Title 21, United States Code, Section 846, as set forth in Counts 1, 2, 4, 5, 6, and 8 of this Indictment, in violation of Title 18, United States Code, Section 924(c); all in violation of Title 18, United States Code, Section 924(o).

COUNT IV

On or about January 13, 2000, at Miami-Dade County, in the Southern District of Florida, and elsewhere, the defendant,

ORESTES DESOTO,

and other persons known and unknown to the Grand Jury, did knowingly and unlawfully obstruct, delay and affect commerce and the movement of articles and commodities in commerce, by robbery, as the terms "commerce" and "robbery" are defined in Title 18, United States Code, Sections 1951(b)(1) and (b)(3), in that the defendant did knowingly and unlawfully take and obtain property consisting of United States currency, belonging to 7-11 stores and A. D. from the person of A. D. against the will of A. D. by means of actual and threatened force, violence

and fear of injury to the person of A. D. in violation of Title 18, United States Code, Sections 1951(a) and 2.

COUNT V

On or about February 5, 2000, at Miami-Dade County, in the Southern District of Florida, and elsewhere, the defendants,

ORESTES DESOTO,
and
CECILIO NUÑEZ,

and other persons known and unknown to the Grand Jury, did knowingly and unlawfully obstruct, delay and affect commerce and the movement of articles and commodities in commerce, by robbery, as the terms "commerce" and "robbery" are defined in Title 18, United States Code, Sections 1951(b)(1) and (b)(3), in that the defendants did knowingly and unlawfully take and obtain property consisting of United States currency and jewelry, belonging to J. G. and Isla De Los Galapagos Restaurant from the person of J. G. against the will of J. G. by means of actual and threatened force, violence and fear of injury to the person of J. G. in violation of Title 18, United States Code, Sections 1951(a) and 2.

COUNT VI

On or about February 5, 2000, at Miami-Dade County, in the Southern District of Florida, and elsewhere, the defendants,

ORESTES DESOTO,
and
CECILIO NUÑEZ,

and other persons known and unknown to the Grand Jury, did knowingly and intentionally attempt to possess with intent to distribute a Schedule II controlled substance, that is, five (5) kilograms or more of a mixture and substance containing a detectable amount of cocaine, in violation of Title 21, United States Code, Section 841(a)(1); all in violation of Title 21, United States Code, Sections 846 and 841(b)(1)(A)(ii) and 2.

COUNT VII

On or about February 5, 2000, at Miami-Dade County, in the Southern District of Florida, and elsewhere, the defendants,

ORESTES DESOTO,
and
CECILIO NUÑEZ,

did knowingly use and carry a firearm during and in relation to a crime of violence and a drug trafficking crime, and did possess a firearm in furtherance of a crime of violence and a drug trafficking crime, which are felonies prosecutable in a court of the United States, that is, violations of Title 18, United States Code, Section 1951(a) and Title 21, United States Code, Section 846, as set forth in Counts 5 and 6 of this Indictment; all in violation of Title 18, United States Code, Sections 924(c)(1)(A)(i), (A)(ii) and 2.

COUNT VIII

On or about February 15, 2000, at Miami-Dade County, in the Southern District of Florida, and elsewhere, the defendants,

ORESTES DESOTO,
and
CECILIO NUÑEZ,

and other persons known and unknown to the Grand Jury, did knowingly and unlawfully obstruct, delay and affect commerce and the movement of articles and commodities in commerce, by robbery, as the terms "commerce" and "robbery" are defined in Title 18, United States Code, Sections 1951(b)(1) and (b)(3), in that the defendants did knowingly and unlawfully take and obtain property consisting of United States currency and a cellular phone, belonging to ~~M. B.~~ [B. M. /s/ M. J.] and La Catalana Bakery from the person of ~~M. B.~~ [B. M. /s/ M. J.] against the will of ~~M. B.~~ [B. M. /s/ M. J.] by means of actual and threatened force, violence and fear of injury to the person of ~~M. B.~~ [B. M. /s/ M. J.] in violation of Title 18, United States Code, Sections 1951(a) and 2.

A TRUE BILL

/s/ [Illegible]
FOREPERSON

/s/ [Illegible] for
GUY A. LEWIS
UNITED STATES ATTORNEY

/s/ [Illegible] for
C.E. "BETH" SREENAN
ASSISTANT UNITED STATES ATTORNEY

Supreme Court, U.S.
FILED
MAR 3 - 2005
OFFICE OF THE CLERK

No. 04-1094

In the Supreme Court of the United States

CECILIO NUNEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

In the Supreme Court of the United States

No. 04-1094

CECILIO NUNEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner contends that his sentence under the federal Sentencing Guidelines was imposed in violation of the rule announced in *United States* v. *Booker* and *United States* v. *Fanfan*, 125 S. Ct. 738 (2005). In *Booker* and *Fanfan*, this Court held that the Sixth Amendment, as construed in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), applies to the federal Sentencing Guidelines. *Booker*, 125 S. Ct. at 748-756 (Stevens, J., for the Court). In answering the remedial question in those cases, the Court then applied severability analysis and held that the Guidelines are advisory rather than mandatory, and that federal sentences are reviewable for reasonableness. *Booker*, 125 S. Ct. at 757-769 (Breyer, J., for the Court). Accordingly, the appropriate disposition is to grant certiorari, vacate the judgment of the court of appeals, and remand the case

for further consideration in light of *Booker* and *Fanfan*. The court of appeals can then decide what effect, if any, those decisions have on petitioner's sentence, taking into account any applicable doctrines of waiver, forfeiture, and harmless error.* See *id.* at 769.

PAUL D. CLEMENT
Acting Solicitor General

MARCH 2005

* The government waives any further response to the petition unless the Court requests otherwise

(3)

Supreme Court, U.S.
FILED
APR 15 2005
OFFICE OF THE CLERK

No. 04-1094

In the Supreme Court of the United States

CECILIO NUNEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL RESPONSE FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

CHRISTOPHER A. WRAY
Assistant Attorney General

ELIZABETH A. OLSON
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the Eleventh Circuit abuses its discretion by applying a longstanding procedural bar rule to decline to consider claims of error under the Sixth Amendment or *United States* v. *Booker*, 125 S. Ct. 738 (2005), in cases in which that argument is not raised in the appellant's opening brief.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 5
Conclusion 15

TABLE OF AUTHORITIES

Cases:

Adams-Arapahoe Joint Sch. Dist. No. 28-J v. *Continental Ins. Co.*, 891 F.2d 772 (10th Cir. 1989) 10
Apprendi v. *New Jersey*, 530 U.S. 466 (2000) 8, 11
Ardley v. *United States*, 535 U.S. 979 (2002) 15
Bickel v. *Korean Air Lines Co.*, 96 F.3d 151 (6th Cir. 1996), cert. denied, 519 U.S. 1093 (1997) 9
Blakely v. *Washington*, 125 S. Ct. 2531 (2004) 2
Cupp v. *Naughten*, 414 U.S. 141 (1973) 13
Edwards v. *Arizona*, 451 U.S. 477 (1981) 7
Garcia v. *United States*, 534 U.S. 823 (2001) 15
Ghana v. *Holland*, 226 F.3d 175 (3d Cir. 2000) 9
Gramegna v. *Johnson*, 846 F.2d 675 (11th Cir. 1988) 11
Greenwood v. *FAA*, 28 F.3d 971 (9th Cir. 1994) 10
Griffith v. *Kentucky*, 479 U.S. 314 (1987) 5, 6, 8

Cases—Continued: Page

Harper v. *Virginia Dep't of Taxation*, 509 U.S. 86 (1993) 8
Holman v. *Indiana*, 211 F.3d 399 (7th Cir.), cert. denied, 531 U.S. 880 (2000) 9
Johnson v. *United States*, 520 U.S. 461 (1997) 8, 14
Kost v. *Kozakiewicz*, 1 F.3d 176 (3d Cir. 1993) 9
Leer v. *Murphy*, 844 F.2d 628 (9th Cir. 1988) 10
Maryland People's Counsel v. *FERC*, 760 F.2d 318 (D.C. Cir. 1985) 10
McGinnis v. *Ingram Equip. Co.*, 918 F.2d 1491 (11th Cir. 1990) 11
Nealy v. *United States*, 534 U.S. 1023 (2001) 15
Ortega-Rodriguez v. *United States*, 507 U.S. 234 (1993) 13
Padilla-Reyes v. *United States*, 534 U.S. 913 (2001) 15
Phillips v. *United States*, 536 U.S. 961 (2002) 15
Playboy Enters. v. *Public Serv. Comm'n*, 906 F.2d 25 (1st Cir.), cert. denied, 498 U.S. 959 (1990) 9
Priddy v. *Edelman*, 883 F.2d 438 (6th Cir. 1989) 9
Schriro v. *Summerlin*, 124 S. Ct. 2519 (2004) 5
Senn v. *United States*, 125 S. Ct. 1397 (2005) 4
Shea v. *Louisiana*, 470 U.S. 51 (1985) 6
Shopco Distrib. Co. v. *Commanding Gen. of Marine Corps Base*, 885 F.2d 167 (4th Cir. 1989) 9

Cases—Continued: Page

Sweat v. *City of Ft. Smith*, 265 F.3d 692 (8th Cir. 2001) 10
Thomas v. *Arn*, 474 U.S. 140 (1985) 13
Thompson v. *United States*, 535 U.S. 1114 (2002) 15
United States v. *Ameline*, 376 F.3d 967 (9th Cir. 2004), on reh'g, 400 F.3d 646 (9th Cir), reh'g en banc granted, 2005 WL 61270 (9th Cir. Mar. 11, 2005) 12
United States v. *Ardley*:
242 F.3d 989 (11th Cir.), cert. denied, 533 U.S. 962 (2001) 3, 4, 11
273 F.3d 991 (11th Cir.), cert. denied, 533 U.S. 979 (2001) 7
United States v. *Booker*, 125 S. Ct. 738 (2005) 3, 4, 7, 8
United States v. *Byers*, 740 F.2d 1104 (D.C. Cir. 1984) 12
United States v. *Cordoza-Estrada*, 385 F.3d 56 (1st Cir. 2004) 12
United States v. *Dockery*, No. 03-16388, 2005 WL 487735 (11th Cir. Mar. 3, 2005) 4, 5, 11
United States v. *Gaudin*, 515 U.S. 506 (1995) 8
United States v. *Henningsen*, 387 F.3d 585 (7th Cir. 2004), subsequent determination, 2005 WL 703934 (7th Cir. Mar. 29, 2005) 12
United States v. *Hughes*, 396 F.3d 374 (4th Cir.), on reh'g, 2005 WL 628224 (4th Cir. Mar. 16, 2005) 12
United States v. *Humphrey*, 287 F.3d 442 (6th Cir. 2002) 8
United States v. *Johnson*, 457 U.S. 537 (1982) 5, 6
United States v. *Keys*, 133 F.3d 1282 (9th Cir.), cert. denied, 525 U.S. 891 (1998) 8

Cases—Continued: Page

United States v. *Levy*:

379 F.3d 1241 (11th Cir.), reh'g denied, 391 F.3d 1327 (11th Cir. 2004), petition for cert. pending, No. 04-8942 (filed Mar. 1, 2005) 11

391 F.3d 1327 (11th Cir. 2004), petition for cert. pending, No. 04-8942 (filed Mar. 1, 2005) ... 11, 14

United States v. *Lovasco*, 431 U.S. 783 (1977) 5

United States v. *Miranda*, 248 F.3d 434 (5th Cir. 2001), cert. denied, 534 U.S. 980 (2001) and 1086 (2002) 9, 10, 12

United States v. *Nealy*, 232 F.3d 825 (11th Cir. 2000), cert. denied, 534 U.S. 1023 (2001) 3

United States v. *Outen*, 286 F.3d 622 (2d Cir. 2002) 8

United States v. *Perez-Covarrubias*, No. 92-30243, 1993 WL 5174 (9th Cir. Jan. 11, 1993) 12

United States v. *Pree*, 384 F.3d 378 (7th Cir. 2004) 12

United States v. *Rivera Pedin*, 861 F.2d 1522 (11th Cir. 1988) 10

United States v. *Quiroz*, 22 F.3d 489 (2d Cir. 1994) 9, 10

United States v. *Rogers*, 118 F.3d 466 (6th Cir. 1997) 12

United States v. *Washington*, 398 F.3d 306 (4th Cir. 2005) 8

United States v. *Wheat*, 278 F.3d 722 (8th Cir. 2001), cert. denied, 537 U.S. 850 (2002) 8

Youakim v. *Miller*, 425 U.S. 231 (1976) 5

Zobrest v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) 5

Constitution, statutes and rules: Page

U.S. Const.:
Amend. IV 5
Amend. VI 3, 4
18 U.S.C. 2 2
18 U.S.C. 924(c) 2
18 U.S.C. 924(*o*) 2
18 U.S.C. 1951(a) 2
Fed. R. App. P.:
Rule 2 ..... 10, 11
Rule 28(a)(9)(A) 9
Rule 47a 13

In the Supreme Court of the United States

No. 04-1094

CECILIO NUNEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL RESPONSE FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals affirming the district court's denial of petitioner's motion for a new trial (Pet. App. 1-9) is unpublished, but the judgment is noted at 116 Fed. Appx. 252 (Table). The earlier opinion of the court of appeals affirming petitioner's conviction but remanding for an evidentiary hearing on his motion for a new trial (Pet. App. 10-33) is unpublished, but the judgment is noted at 82 Fed. Appx. 221 (Table).

JURISDICTION

The judgment of the court of appeals was entered on August 26, 2004. A petition for rehearing was denied on November 19, 2004. The petition for a writ of certiorari was filed on February 11, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was a police officer for the City of Hialeah, Florida. Along with another police officer and a group of co-conspirators, petitioner engaged in a series of robberies of individuals and businesses.

2. Petitioner was convicted, following a jury trial, of conspiracy to commit robbery under the Hobbs Act, in violation of 18 U.S.C. 1951(a) (Count 2); conspiracy to use a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(*o*) (Count 3); two counts of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) and 2 (Counts 5 and 8); and using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) and 2 (Count 7). Pet. App. 2. The district court sentenced petitioner to imprisonment for a term of 188 months on Counts 2, 3, 5, and 8, *id.* at 40, 43, and a consecutive 84-month term of imprisonment on Count 7. *Id.* at 43.

On August 28, 2003, the court of appeals affirmed petitioner's conviction, but remanded for an evidentiary hearing on petitioner's motion for a new trial. Pet. App. 10-11. On August 26, 2004, the court of appeals affirmed the district court's denial of petitioner's motion for a new trial. *Id.* at 1-9. In his two appeals, petitioner raised a number of claims challenging his conviction and the district court's denial of his motion for a new trial. Petitioner did not, however, challenge the sentence the district court imposed. Nor did petitioner raise a Sixth Amendment challenge to his sentence in his petition for rehearing, which he filed on October 18, 2004, nearly four months after this Court's decision in *Blakely* v. *Washington*, 125 S. Ct. 2531 (2004).

3. In *United States* v. *Booker*, 125 S. Ct. 738 (2005), this Court held that the Sixth Amendment, as construed in *Blakely*, applies to the federal Sentencing Guidelines. *Id.* at 748-756 (Stevens, J., for the Court). In answering the remedial question in *Booker*, the Court applied severability analysis and held that the Guidelines are advisory rather than mandatory, and that federal sentences are reviewable for unreasonableness. *Id.* at 757-769 (Breyer, J., for the Court).

4. In the wake of *Booker*, a significant number of federal criminal defendants have sought review in this Court based on that decision (or *Blakely*). In most such cases, the government has suggested that the Court grant the petition, vacate the judgment, and remand for further consideration in light of *Booker*, leaving it to the court of appeals to apply doctrines such as plain error, harmless error, or waiver, as applicable. In *Senn* v. *United States*, 125 S. Ct. 1397 (2005) (No. 04-7175), the government took a different approach. The petition in *Senn* raised both a constitutional challenge to the composition of the court of appeals panel that decided that case and a claim that the Guidelines sentence imposed violated the rule announced in *Blakely*. In its brief in opposition, the government noted that the Eleventh Circuit had denied that petitioner's motion to file a supplemental brief that would have raised, for the first time, a *Blakely* challenge to his sentence. See Br. in Opp. at 28-29, *Senn*, *supra* (No. 04-7175). Because the Eleventh Circuit has held that arguments not raised in a party's opening brief are deemed abandoned, see, *e.g.*, *United States* v. *Ardley*, 242 F.3d 989, 990 (11th Cir.), cert. denied, 533 U.S. 962 (2001); *United States* v. *Nealy*, 232 F.3d 825, 830 (11th Cir. 2000), cert. denied, 534 U.S. 1023 (2001), and because there was no reason

to believe that the Eleventh Circuit would consider on the merits a *Booker* claim that the petitioner had not adequately preserved under that procedural bar rule, the government suggested that the petition be denied. Br. in Opp. at 28-29, *Senn*, *supra* (No. 04-7175). This Court nonetheless granted certiorari, vacated the judgment of the court of appeals, and remanded the case for further consideration in light of *Booker*. See 125 S. Ct. 1397.

In light of this Court's disposition of *Senn*, the government stated in its memorandum filed in this case that it would be appropriate to grant certiorari, vacate the judgment of the court of appeals, and remand the case for further consideration in light of *Booker*. See Mem. 1-2 (filed Mar. 3, 2005).

5. The day that the government filed its memorandum in this case, the Eleventh Circuit addressed the application to *Booker* claims of its rule that issues not raised in a party's opening brief will be deemed abandoned. See *United States* v. *Dockery*, No. 03-15388, 2005 WL 487735, at *1 (11th Cir. Mar. 3, 2005). In *Dockery*, the Eleventh Circuit held, in a case that this Court had remanded for reconsideration in light of *Booker*, that the defendant would be deemed to have abandoned his Sixth Amendment challenge to the Guidelines by failing to raise it in his opening brief. *Ibid.* The court of appeals stated that it saw nothing

> in the Supreme Court's remand order, which is cast in the usual language, requiring that we treat the case as though the * * * issue had been timely raised in this Court. In the absence of any requirement to the contrary in either [*Booker*] or in the order remanding this case to us, we apply our well-

> established rule that issues and contentions not timely raised in the briefs are deemed abandoned.

Ibid. (quoting *Ardley*, 242 F.3d at 990).

ARGUMENT

For the first time in any court, petitioner challenges the Eleventh Circuit's decision not to entertain *Booker* and *Blakely* claims that are not raised in a party's initial brief. Petitioner contends (Pet. 8-10) that the Eleventh Circuit's prudential rule contravenes the retroactivity principle of *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), which, petitioner notes, this Court also invoked in *Schriro* v. *Summerlin*, 124 S. Ct. 2519, 2523 (2004) (citing *Griffith* in passing), and applied in *United States* v. *Johnson*, 457 U.S. 537, 545 n.9 (1982) (applying reasoning similar to *Griffith* to conclude that a decision by this Court construing the Fourth Amendment is to be applied retroactively to all convictions not yet final at the time the decision was rendered). Petitioner also contends (Pet. 15-23) that the Eleventh Circuit's position conflicts with decisions of "[t]he eleven other federal circuits." Pet. 18. This Court does not ordinarily review claims that were neither raised nor resolved below. See, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (per curiam). In any event, neither contention has merit. Further review is not warranted.[1]

---

[1] Because the court of appeals confirmed in *United States* v. *Dockery*, No. 03-16388, 2005 WL 487735, at *1 (11th Cir. Mar. 3, 2005), that a remand for further consideration in light of *Booker* does not alter the court of appeals' application of its longstanding rule that issues not raised in an appellant's opening brief are deemed abandoned, the government has concluded, notwithstanding the position taken in the

1. In *Griffith*, this Court held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases * * * pending on direct review or not yet final." 479 U.S. at 328. Because the petitioner in *Griffith* had preserved the claim on which he sought review, the Court did not have occasion to consider the interplay between the retroactivity rule adopted in that case and principles of waiver, forfeiture, and other prudential doctrines. See *id.* at 317, 318; see also *Johnson*, 457 U.S. at 539-540 (noting that respondent's Fourth Amendment claim was raised before the district court and on appeal).

Application of procedural default rules is consonant with the retroactivity principle of *Griffith*. *Griffith* concluded that retroactive application of new rules on direct appeal was necessary both because of "the nature of judicial review" and in order to "treat[] similarly situated defendants the same." 479 U.S. at 322-323. That rationale is in no way inconsistent with application of procedural default rules to bar consideration of claims that have not been adequately preserved. Defendants who have not preserved a claim of error are not "similarly situated" (*id.* at 323) to those who have. Cf. *Shea* v. *Louisiana*, 470 U.S. 51, 59-60 (1985) (holding that it is not inequitable to draw a distinction between a defendant who raises a claim on collateral attack and one who raises it on direct review because "[t]he one litigant already has taken his case through the primary system" and "[t]he other has not"). Application of procedural bar rules does not offend principles requiring the retro-

---

memorandum filed in this case, see Mem. 1-2, that it is unnecessary for this Court to remand this case for reconsideration in light of *Booker*.

active application of new constitutional rules to cases open on direct review.

> Retroactivity doctrine answers the question of which cases a new decision applies to, assuming that the issue involving that new decision has been timely raised and preserved. Procedural bar doctrine answers the question of whether an issue was timely raised and preserved, and if not, whether it should be decided anyway. It makes no more sense to say that a procedural bar should not be applied in this situation because doing so undermines or frustrates retroactive application of a Supreme Court decision, than it does to say that procedural bars should not be applied in any situation because doing so undermines or frustrates the constitutional doctrines and commands underlying the issue that is held to be defaulted.

United States v. *Ardley*, 273 F.3d 991, 992 (11th Cir.) (Carnes, J., concurring in denial of rehearing en banc), cert. denied, 533 U.S. 962 (2001).

On several occasions, this Court has indicated that the retroactivity principle embodied in *Griffith* is in no way inconsistent with the application of procedural default rules. In *Shea* v. *Louisiana*, *supra*, for example, the Court held that the rule announced in *Edwards* v. *Arizona*, 451 U.S. 477 (1981), would be applied retroactively to cases pending on direct review. 470 U.S. at 59. In doing so, the Court explicitly noted that the retroactive application of *Edwards* was "subject, of course, to established principles of waiver, harmless error, and the like." *Id.* at 58 n.4. Similarly, in *Booker* itself, the Court stated that while courts were bound to apply its holding "to all cases on direct review," 125 S. Ct. at 769

(citing *Griffith*, 479 U.S. at 328), "we expect reviewing courts to apply ordinary prudential doctrines," including, specifically, the plain error doctrine for claims that have not been preserved, *ibid.* See also *Johnson* v. *United States*, 520 U.S. 461, 467 (1997) (noting that rule of *United States* v. *Gaudin*, 515 U.S. 506 (1995), applied retroactively under *Griffith*, but unpreserved claims were subject to review only for plain error); *Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86, 104 n.1 (1993) (Scalia, J., concurring) (noting, as the Court extended the holding of *Griffith* to civil cases, that "a party may procedurally default on a claim in either [the civil or criminal] context").[2] This Court has never suggested the contrary.[3]

---

[2] Accord, *e.g.*, *United States* v. *Humphrey*, 287 F.3d 422, 442 (6th Cir. 2002) (noting that although *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), applies retroactively to cases on direct review under *Griffith*, unpreserved claims were subject to plain error review); *United States* v. *Outen*, 286 F.3d 622, 634 (2d Cir. 2002) (same); *United States* v. *Wheat*, 278 F.3d 722, 739 (8th Cir. 2001) (same), cert. denied, 537 U.S. 850 (2002); *United States* v. *Keys*, 133 F.3d 1282, 1285-1286 (9th Cir.) (en banc) (holding that although rule of *Gaudin* applied retroactively to cases on direct review under *Griffith*, unpreserved claims were subject to review only for plain error), cert. denied, 525 U.S. 891 (1998).

[3] The Fourth Circuit recently stated in a footnote, and without briefing or argument by the parties on the issue, that "[a]lthough appellate contentions not raised in an opening brief are normally deemed to have been waived, the *Booker* principles apply in this proceeding because the Court specifically mandated that we 'must apply [*Booker*] . . . to all cases on direct review.'" *United States* v. *Washington*, 398 F.3d 306, 312 n.7 (4th Cir. 2005) (citation omitted; brackets in original) (quoting *Booker*, 125 S. Ct. at 769 (Breyer, J., for the Court)). The government was unable to seek rehearing in that case because the court of appeals, after the time for filing a petition for rehearing had expired, denied the timely filed joint motion of the parties for an extension of time in which to file a rehearing petition.

2. Petitioner also contends (Pet. 16-23) that the Eleventh Circuit's application of its procedural bar rule conflicts with the law of every other court of appeals, and that Supreme Court review is necessary to resolve the circuit conflict.

a. The Federal Rules of Appellate Procedure provide that an appellant's brief "must contain * * * appellant's contentions and the reasons for them." Fed. R. App. P. 28(a)(9)(A). The courts of appeals have without exception interpreted that provision to establish a general prudential rule that "[a]n appellant waives any issue which it does not adequately raise in its initial brief." *Playboy Enters.* v. *Public Serv. Comm'n*, 906 F.2d 25, 40 (1st Cir.), cert. denied, 498 U.S. 959 (1990).[4]

The Fourth Circuit should be given an opportunity to reconsider that erroneous conclusion in an appropriate case.

[4] Accord, *e.g.*, *United States* v. *Quiroz*, 22 F.3d 489, 490-491 (2d Cir. 1994) ("It is well established that an argument not raised on appeal is deemed abandoned, and we will not ordinarily consider such an argument unless manifest injustice otherwise would result.") (internal citations and quotation marks omitted); *Ghana* v. *Holland*, 226 F.3d 175, 180 (3d Cir. 2000) ("It is well settled that if an appellant fails to comply with these [Rule 28] requirements on a particular issue, he normally has abandoned and waived that issue on appeal.") (quoting *Kost* v. *Kozakiewicz*, 1 F.3d 176, 183 (3d Cir. 1993)) (alterations omitted); *Shopco Distrib. Co.* v. *Commanding Gen. of Marine Corps Base*, 885 F.2d 167, 170 n.3 (4th Cir. 1989) (holding that any claim not raised in a party's initial brief will be deemed waived) (collecting authorities); *United States* v. *Miranda*, 248 F.3d 434, 443 (5th Cir. 2001) ("Failure to satisfy the requirements of Rule 28 as to a particular issue ordinarily constitutes abandonment of the issue."), cert. denied, 534 U.S. 980 (2001) and 1086 (2002); *Bickel* v. *Korean Air Lines Co.*, 96 F.3d 151, 153 (6th Cir. 1996) ("We normally decline to consider issues not raised in the appellant's opening brief.") (quoting *Priddy* v. *Edelman*, 883 F.2d 438, 446 (6th Cir. 1989)), cert. denied, 519 U.S. 1093 (1997); *Holman* v. *Indiana*, 211 F.3d 399, 406 (7th Cir.) (finding

The courts of appeals have recognized that that rule is not jurisdictional, and therefore that courts have authority, in the exercise of their discretion, to address issues not timely raised by the parties. See, *e.g.*, *United States* v. *Miranda*, 248 F.3d 434, 443-444 (5th Cir. 2001) (noting that "the issues-not-briefed-are-waived rule is a prudential construct that requires the exercise of discretion" and that the court may consider an issue that was not timely raised "where substantial public interests are involved"), cert. denied, 534 U.S. 980 (2001) and 1086 (2002); *United States* v. *Quiroz*, 22 F.3d 489, 490-491 (2d Cir. 1994) (court will review issue not raised in the brief where manifest injustice would otherwise result); *Leer* v. *Murphy*, 844 F.2d 628, 634 (9th Cir. 1988) (same). See also Fed. R. App. P. 2 (granting courts discretion to suspend most rules for "good cause"). The Eleventh Circuit specifically has recognized that it has the authority to relieve litigants of the consequences of default and address an issue on the merits where manifest injustice would otherwise result.[5] In the exercise of

---

arguments not raised in initial brief waived), cert. denied, 531 U.S. 880 (2000); *Sweat* v. *City of Ft. Smith*, 265 F.3d 692, 696 (8th Cir. 2001) ("[C]laims not raised in an initial appeal brief are waived."); *Greenwood* v. *FAA*, 28 F.3d 971, 977 (9th Cir. 1994) ("We review only issues which are argued specifically and distinctly in a party's opening brief."); *Adams-Arapahoe Joint Sch. Dist. No. 28-J* v. *Continental Ins. Co.*, 891 F.2d 772, 776 (10th Cir. 1989) (holding that "[a]n issue not included in either the docketing statement or the statement of issues in the party's initial brief is waived on appeal"); *Maryland People's Counsel* v. *FERC*, 760 F.2d 318, 319-320 (D.C. Cir. 1985) (deeming an issue waived where a party did not raise it until supplemental briefing).

[5] See, *e.g.*, *United States* v. *Rivera Pedin*, 861 F.2d 1522, 1526 n.9 (11th Cir. 1988) (pursuant to Rule 2 of the Federal Rules of Appellate Procedure, considering an issue raised only in co-defendant's brief, despite defendant's failure to adopt by reference his co-defendant's

its discretion, however, the Eleventh Circuit has declined to exempt *Booker* and *Blakely* claims from the operation of its longstanding rule that it will not consider claims unless they were timely raised in the appellant's opening brief. See, *e.g.*, *Dockery*, 2005 WL 487735, at *1 (involving *Booker* claims); *United States* v. *Levy*, 379 F.3d 1241, 1243 n.3 (11th Cir.) ("[W]e conclude that 'there would be no miscarriage of justice if we decline to address' *Blakely*-type issues not raised in opening briefs on appeal.") (quoting *McGinnis* v. *Ingram Equip. Co.*, 918 F.2d 1491, 1496 (11th Cir. 1990) (en banc)), reh'g denied, 391 F.3d 1327 (11th Cir. 2004), petition for cert. pending, No. 04-8942 (filed Mar. 1, 2005); see also *United States* v. *Ardley*, 242 F.3d 989, 990 (11th Cir.) (declining to exempt claims under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), from operation of rule), cert. denied, 533 U.S. 962 (2001).

Petitioner asserts (Pet. 16) that the Eleventh Circuit's application of the procedural bar rule "directly contradicts every other Circuit" because other courts have entertained on the merits challenges based on intervening decisions of this Court in *Booker*, *Blakely*, and *Apprendi*, even if they were not raised in the defendant's opening brief. See Pet. 16-23 & n.4. Of the numerous federal cases petitioner cites, only *two* explicitly considered whether to apply the ordinary prudential rule that issues not raised in an opening brief would not

---

arguments); *Gramegna* v. *Johnson*, 846 F.2d 675 (11th Cir. 1988) (vacating judgment based on issue raised sua sponte by the court, pursuant to Rule 2); see also *United States* v. *Levy*, 391 F.3d 1327, 1335 (11th Cir. 2004) (Hull, J., concurring in denial of rehearing en banc) ("The issue is not whether this Court has the power to consider issues not raised in the initial brief; of course it does."), petition for cert. pending, No. 04-8942 (filed Mar. 1, 2005).

be considered.[6] *Miranda*, 248 F.3d at 443-444 (cited at Pet. 17) (discussing *Apprendi* claim); *United States* v. *Byers*, 740 F.2d 1104, 1115 n.11 (D.C. Cir. 1984) (cited at Pet. 20). In both cases, the courts may have exercised discretion to proceed to the merits of the argument the defendant had raised only because the court concluded it clearly lacked merit. See *Miranda*, 248 F.3d at 446; *Byers*, 740 F.2d at 1118 ("obvious" that conditions necessary for relief not met); *id.* at 1121 (noting claim has been "uniformly rejected by other circuits"). Thus, it appears that most courts that have addressed claims in this posture have not explicitly declined to apply the default rule, and thus those decisions cannot be said to "conflict" with the decision below.

b. Even if other courts of appeals *had* explicitly declined to apply the usual procedural bar rule to claims based on intervening decisions of this Court in *Booker*

---

[6] In addition, four other opinions petitioner cites (Pet. 17-18 & n.4) stated, without discussing the rule that claims must be raised in a party's opening brief, that it was appropriate to consider the claims in that posture because this Court had recently clarified the law. See *United States* v. *Ameline*, 376 F.3d 967 (9th Cir. 2004), on reh'g, 400 F.3d 646 (9th Cir.), reh'g en banc granted, 2005 WL 612710 (9th Cir. Mar. 11, 2005); *United States* v. *Henningsen*, 387 F.3d 585, 591 (7th Cir. 2004), subsequent determination, 2005 WL 703934 (7th Cir. Mar. 29, 2005); *United States* v. *Cordoza-Estrada*, 385 F.3d 56, 59 (1st Cir. 2004); *United States* v. *Pree*, 384 F.3d 378, 396 (7th Cir. 2004). In *United States* v. *Perez-Covarrubias*, No. 92-30243, 1993 WL 5174, at *1 n.1 (9th Cir. Jan. 11, 1993) (cited at Pet. 23), the *government* conceded error in its opening brief, which was sufficient to preserve the claim. *United States* v. *Rogers*, 118 F.3d 466, 471 (6th Cir. 1997), and *United States* v. *Hughes*, 396 F.3d 374, 380-381 & n.8 (4th Cir.), on reh'g, 2005 WL 628224 (4th Cir. Mar. 16, 2005), cited by petitioner (Pet. 16-18), discussed only the implications of the defendants' failure to raise the claim before the district court, rather than their failure to raise *Blakely*-type claims in their initial briefs before the court of appeals.

and *Blakely*, further review would not be warranted. Rules governing the consideration of unpreserved claims may appropriately be viewed as local rules that can differ from circuit to circuit. So long as such local rules are reasonable, see *Thomas* v. *Arn*, 474 U.S. 140, 146-148 (1985), and consistent with Acts of Congress and the Federal Rules of Appellate Procedure, see Fed. R. App. P. 47(a), there is no requirement of "uniformity among the circuits in their approach to [such] rules." *Ortega-Rodriguez* v. *United States*, 507 U.S. 234, 251 n.24 (1993). Indeed, this Court specifically has acknowledged the power of courts of appeals to adopt rules restricting the consideration of issues not raised in a timely manner. In *Thomas* v. *Arn*, *supra*, this Court held that the Sixth Circuit had not abused its discretion by promulgating a rule that a party waived the right to appellate review of a district court judgment that adopted a magistrate's recommendation when the party had failed to file objections with the district court identifying those issues on which review was desired. The Sixth Circuit's "nonjurisdictional waiver provision," like the rule at issue here, would ordinarily "preclud[e] appellate review of any issue" not raised in the manner prescribed, although the court of appeals could "excuse the default in the interests of justice." *Thomas*, 474 U.S. at 147-148, 155. Noting that such a rule was supported by sound considerations of judicial economy, *id.* at 148, this Court concluded that the courts of appeals had authority to adopt "procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the Constitution." *Id.* at 146-147 (quoting *Cupp* v. *Naughten*, 414 U.S. 141, 146 (1973)).

Procedural bar rules of the sort at issue here promote efficiency by avoiding piecemeal briefing of appeals and ensuring that the appellee has the opportunity to respond to all issues raised by the appellant without supplemental briefing. Such rules are especially important because of the courts of appeals' increasingly heavy caseloads. Petitioner contends (Pet. 11 n.2, 24) that the court of appeals' rule should be rejected because it would give litigants an incentive to raise numerous claims that were precluded by existing precedent. Although the same could be said of any procedural default rule that attaches consequences to the failure to raise a claim, this Court rejected the position that the futility of raising a claim under existing law wholly excuses a litigant from preserving it. See, *e.g.*, *Johnson*, 520 U.S. at 467-468 (reviewing unpreserved claim only for plain error although the argument was foreclosed by "near-uniform precedent both from this Court and from the Courts of Appeals"); see also *Levy*, 391 F.3d at 1332 (Hull, concurring in the denial of rehearing en banc) ("If defendants were going to raise a long and useless laundry list of objections, they already would have been doing exactly that in the district court so objections could receive full *de novo* review [on appeal], rather than plain-error review."), petition for cert. pending, No. 04-8942 (filed Mar. 1, 2005); *id.* at 1333 (noting that "numerous defendants" had properly preserved their claims by "rais[ing] *Apprendi*-type arguments in their challenges to enhancements under the federal Sentencing Guidelines") (collecting cases).

This Court has denied review in a number of cases in which the Eleventh Circuit declined to entertain a claim under the intervening decisions in *Blakely* or *Apprendi* solely because it was not raised in the petitioner's open-

ing brief, see, *e.g.*, *Ardley* v. *United States*, 535 U.S. 979 (2002) (No. 01-8714); *Nealy* v. *United States*, 534 U.S. 1023 (2001) (No. 01-5152); *Padilla-Reyes* v. *United States*, 534 U.S. 913 (2001) (No. 01-5284), and denied review in several cases that specifically challenged application of the procedural bar rule in that context, see, *e.g.*, *Phillips* v. *United States*, 536 U.S. 961 (2002) (No. 01-5718) (denying review when petitioner challenged application of rule to bar consideration of *Apprendi* claim); *Garcia* v. *United States*, 534 U.S. 823 (2001) (No. 00-1866) (denying review when Eleventh Circuit declined, on remand from this Court for reconsideration in light of *Apprendi*, to consider claim because it was not raised in initial brief); see also *Thompson* v. *United States*, 535 U.S. 1114 (2002) (No. 01-8603) (challenging application of rule to bar consideration of ex post facto claim). There is no reason for a different result in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

CHRISTOPHER A. WRAY
Assistant Attorney General

ELIZABETH A. OLSON
Attorney

APRIL 2005

(4)

No. 04-1094

Supreme Court, U.S.
FILED
APR 25 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CECILIO NUÑEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

NUÑEZ REPLY BRIEF

NEIL M. SCHUSTER, P.A.
555 N.E. 15 Street, Suite 2C
Miami, FL 33132
Tel: (305) 416-0324/Fax: (305) 416-0325
Email: nmschus@bellsouth.net
Florida Bar No. 216909
Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The Petitioner disagrees with the issue presented by the government and restates his original question asking whether this Court requires uniform application of *United States v. Booker*, 125 S. Ct. 738 (2005), *Blakely v. Washington*, 124 S. Ct. 2531 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000) to all cases presently on direct appeal and therefore adhere to that portion of its precedents in *Schriro v. Summerlin*, 124 S. Ct. 2519, 2523 (2004); *Griffith v. Kentucky*, 479 U.S. 314, 322-23 (1987); and *United States v. Johnson*, 457 U.S. 537 (1982).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
PREFACE	1
ARGUMENT	1
I. *Griffith* Should Apply to All Pipeline Cases	4
II. *Sanchez* Foreclosed Nuñez's *Booker* Claim	6
III. The Procedural/Prudential Bar Rule Cannot Override *Griffith*	8
CONCLUSION	10

TABLE OF AUTHORITIES

Page

SUPREME COURT CASES

Apprendi v. New Jersey, 530 U.S. 466 (2000) ..... *passim*

Blakely v. Washington, 124 S. Ct. 2531 (2004) ..... *passim*

Desist v. United States, 394 U.S. 244 (1969) 5

Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council, 485 U.S. 568 (1988) 9

Griffith v. Kentucky, 479 U.S. 314 (1987) ..... *passim*

Johnson v. United States, 520 U.S. 461 (1997) 6, 8

Linkletter v. Walker, 381 U.S. 618 (1965) 5

Mackey v. United States, 401 U.S. 667 (1971) 5, 8

Schriro v. Summerlin, 124 S. Ct. 2519 (2004) 1, 8

Thomas v. Arn, 474 U.S. 140 (1985) 9

United States v. Atkinson, 297 U.S. 157 (1936) 9

United States v. Booker, 125 S. Ct. 738 (2005) ..... *passim*

United States v. Johnson, 457 U.S. 537 (1982) 1, 5

LOWER COURT CASES

Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480 (9th Cir. 1995) 3

United States v. Ameline, 400 F.3d 646 (9th Cir. 2005) 3

United States v. Ardley, 242 F.3d 989, *denying reh'g en banc*, 273 F.3d 991 (11th Cir. 2001) 2, 9

TABLE OF AUTHORITIES – Continued

Page

United States v. Badilla, 383 F.3d 1137 (10th Cir. 2004), *certiorari granted, judgment vacated* by *Badilla v. U.S.*, 125 S. Ct. 1086 (2005) 3

United States v. Cordoza-Estrada, 385 F.3d 56 (1st Cir. 2004) 3

United States v. Crosby, 397 F.3d 103 (2d Cir. 2005) 4

United States v. Curtis, 380 F.3d 1308 (11th Cir. 2004) 4

United States v. Diaz, 248 F.3d 1065 (11th Cir. 2001) 7

United States v. Dockery, 401 F.3d 1261 (11th Cir. 2005) 1, 4, 10

United States v. Garcia, 77 F.3d 274 (9th Cir. 1996) 3

United States v. Gaudin, 515 U.S. 506 (1995) 6

United States v. Harris, 244 F.3d 828 (11th Cir. 2001) 7

United States v. Hembree, 381 F.3d 1109 (11th Cir. 2004) 4

United States v. Levy, 379 F.3d 1241 (11th Cir. 2004) 3, 6, 7, 8

United States v. Levy, 391 F.3d 1327 (11th Cir. 2004), *petition for certiorari filed* (March 1, 2005) (No. 04-8942) 2, 3

United States v. Nealy, 232 F.3d 825 (11th Cir. 2000), *cert. denied*, 534 U.S. 1023 (2001) 2, 7, 8, 9

United States v. Oliver, 397 F.3d 369 (6th Cir. 2005) 3

United States v. Paladino, 401 F.3d 471 (7th Cir. 2005) 3

TABLE OF AUTHORITIES – Continued

Page

United States v. Pinargote-Ramirez, 116 Fed. Appx. 246, 2004 WL 1800667 (11th Cir. 2004), *certiorari granted, judgment vacated by Pinargote-Ramirez v. U.S.*, 2005 WL 353619 (U.S.), No. 04-8632 2

United States v. Reese, 382 F.3d 1308 (11th Cir. 2004) 7

United States v. Sanchez, 269 F.3d 1250 (11th Cir. 2001) 7, 10

United States v. Washington, 398 F.3d 306 (4th Cir. 2005) 3

RULES

Fed. R. App. P. 28 ..... 4, 9

Fed. R. Crim. P. 52 9

Sup. Ct. R. 15 1

PREFACE

The Solicitor General initially asked this Honorable Court to "vacate the judgment of the Court of Appeals, and remand for further consideration in light of *Booker* and *Fanfan*." *See* Memorandum for the United States, pp. 1-2, March 2005. The government sought permission to file a supplemental brief. That brief reverses its earlier position. Pursuant to the Rules of the Supreme Court, Rule 15, a supplemental brief is restricted to new matters, new cases, or new legislation where such intervening matters were not available at the time of the parties last filing. Here, amongst the sixty some odd cases cited, only one case, *United States v. Dockery*, 401 F.3d 1261 (11th Cir. 2005) was decided after its March 2005 filing.

ARGUMENT

In its supplemental pleading, the government claims that this Court's retroactivity principles do not take precedence over the Eleventh Circuit's prudential rule of declining to apply new rules of law on direct appeal. *See Schriro v. Summerlin*, 124 S. Ct. 2519, 2523 (2004); *Griffith v. Kentucky*, 479 U.S. 314, 322-23 (1987); and *United States v. Johnson*, 457 U.S. 537, 545 n. 2 (1982). The Circuit conflict on *Booker/Blakely* remands from this Court as well as the extraordinary limitations in which an appellant can raise such claims in the Eleventh Circuit (compared to all other circuits), amply describes the need for a single rule of law that would allow uniform application to all cases on direct appeal.

This case presents a constitutional *Booker* error. *United States v. Booker*, 125 S. Ct. 738 (2005). The court erred by relying upon judge-found facts to exponentially and mandatorily enhance Nuñez' sentence. As *Booker* makes clear, the Sixth Amendment prohibits this practice. *Booker*, 125 S. Ct. at 756 (2005). The Solicitor General asks that notwithstanding this constitutional violation, the Eleventh Circuit should not review this case. However, in its remedial holding this Court outlined how its decision was to be applied and notes, "[W]e must apply today's

holding – both the Sixth Amendment holding and our remedial interpretation of the Sentencing Act – to all cases on direct review." *Booker*, 125 S. Ct. at 769. As a result, it is clear that notwithstanding the Solicitor General's protestations and Eleventh Circuit practice, *Booker* must be applied retroactively to cases, such as Nuñez, that were pending on direct review at the time of Booker's issuance. Secondly, Nuñez' case involves a Sixth Amendment sentencing violation. Third, review must occur at least under the plain error test because this does involve a constitutional violation where a sentence was unconstitutionally imposed in an unconstitutional manner with exponentially more severe result than permitted by law.

The prosecution primarily relies upon *United States v. Ardley*, 242 F.3d 989, 990, *denying reh'g en banc*, 273 F.3d 991, 992 (11th Cir.), (Carnes, J., concurring in denial of *reh'g en banc*), *cert. denied*, 533 U.S. 962 (2001) (but *see Ardley*, 273 F.3d at 992, Tjoflat, J., dissenting from the denial of rehearing *en banc*); *United States v. Nealy*, 232 F.3d 825, 830 (11th Cir. 2000), *cert. denied*, 534 U.S. 1023 (2001); and *United States v. Levy*, 391 F.3d 1327, 1340 (11th Cir. 2004), *petition for certiorari filed* (March 1, 2005) (No. 04-8942)[1] (but *see* Tjoflat, J., dissenting from the denial of rehearing *en banc*).

The Tjoflat dissent in *Ardley/Levy* criticizes fellow circuit judges for a patently unfair procedural rule violative of *Griffith* that obscures the intent of the Supreme Court in treating similarly situated defendants in a similar manner because of its overriding fear of "do-overs."

> But when the Supreme Court decided *Griffith*, it was well aware that extending retroactivity to all cases pending on direct review. . . . As a court of

[1] The Petitioner respectfully incorporates by reference those same arguments here, all of which suggest mandatory procedural default rules should not contravene the retroactivity principles of *Griffith v. Kentucky*. *See also*, *U.S. v. Pinargote-Ramirez*, 116 Fed. Appx. 246, 2004 WL 1800667 (11th Cir. 2004), *certiorari granted, judgment vacated by Pinargote-Ramirez v. U.S.*, 2005 WL 353619 (U.S.), No. 04-8632.

> appeals, we cannot now reevaluate such considerations on a case-by-case basis – *Griffith* made this decision for us.

United States v. Levy, 391 F.3d at 1341 (Tjoflat, J. dissenting). In this context it is particularly instructive to review the plethora of cases cited by Former Chief Judge Tjoflat showing that the Eleventh Circuit stands alone on its refusal to apply *Apprendi/Blakely/Booker* to pipeline cases. *See Levy*, 391 F.3d at 1345-47, n. 15-16.[2]

---

[2] Beyond the scores of cases cited by Judge Tjoflat, *see also U.S. v. Washington*, 398 F.3d 306, 312, n. 7 (4th Cir. 2005) ("Although appellate contentions not raised in an opening brief are normally deemed to have been waived . . . the *Booker* principles apply in this proceeding because the Court specifically mandated that we "must apply [*Booker*] . . . to all cases on direct review." Breyer Opinion at 25."); *U.S. v. Oliver*, 397 F.3d 369, 377, n. 1. (6th Cir. 2005) ("Oliver's brief did not initially raise the claim that his sentence violated the Sixth Amendment as the brief was submitted prior to the Supreme Court's ruling in either *Blakely v. Washington* . . . or *U.S. v. Booker*, 125 S. Ct. 738 (2005). . . . Oliver submitted a letter pursuant to Federal Rule of Appellate Procedure 28(j) advising us that *Blakely* constituted a supplemental authority pertaining to Oliver's sentencing challenge. . . . We agree with the First Circuit's determination in *U.S. v. Cordoza-Estrada*, 385 F.3d 56 (1st Cir. 2004) that: "Since Appellant's argument depends upon a decision that did not exist at the time of briefing, a 28(j) letter is a perfectly appropriate avenue by which to present it." *Id.* at 59.); *U.S. v. Paladino*, 401 F.3d 471, 484 (7th Cir. 2005) ("[W]e cannot fathom why the Eleventh Circuit wants to condemn some unknown fraction of criminal defendants to serve an illegal sentence," collecting cases on circuit conflict over application of plain error review to *Booker* errors; strongly disagreeing with Eleventh Circuit's position); *U.S. v. Badilla*, 383 F.3d 1137 (10th Cir. 2004) (*Blakely* raised in Rule 28 letter), *certiorari granted, judgment vacated* by *Badilla v. U.S.* 125 S. Ct. 1086 (2005); *U.S. v. Ameline*, 400 F.3d 646, 652 (9th Cir. 2005) ("Our precedent provides ample support for our authority to consider *sua sponte* a claim that was not initially raised on appeal. We previously have "examine[d] *sua sponte* the application of [a] recent Supreme Court opinion" to a defendant's conviction. *U.S. v. Garcia*, 77 F.3d 274, 276 (9th Cir. 1996); *see also Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1488 (9th Cir. 1995) (holding that "[w]e will review an issue that has been raised for the first time on appeal under certain narrow circumstances," including "when a change in law raises a new issue while an appeal is pending"); *U.S. v. Paladino*, 401 F.3d 471, 483-484 (7th Cir. 2005)

(Continued on following page)

I. *Griffith* Should Apply to All Pipeline Cases.

The Supreme Court announced new Sixth Amendment rights in *Blakely* and *Booker*. *Blakely* and *Booker* predominantly impact those cases in which the Defendant does not waive his Sixth Amendment right, and instead, like here, proceeds to trial by a jury as guaranteed by the constitution. In those cases, which constitute a very small fraction of the total number of criminal cases in the federal system, it is eminently important to protect a Defendant's *Blakely/Booker* rights under the Sixth Amendment, particularly when the matter is still on direct appeal.[3]

("whether the kind of plain error argued in these cases has actually occurred is to ask the district judge. We agree . . . with the Second Circuit's ruling in *U.S. v. Crosby*, 397 F.3d 103, 117 (2d Cir. 2005), that what an appellate court should do in *Booker* cases . . . while retaining jurisdiction of the appeal, order a limited remand to permit the sentencing judge to determine whether he would (if required to resentence) reimpose his original sentence . . . *See also U.S. v. Williams*, 399 F.3d 450 (2d Cir. 2005)"). The Eleventh Circuit's practice is merely a local rule and as such conflicts with Fed. R. App. P. 28(j) itself because it effectively uses its construction of that rule to place restrictions on *Griffith*. Compare, *U.S. v. Hembree*, 381 F.3d 1109 (11th Cir. 2004) (Defendant's motion for leave to file a substitute principal brief for purpose of raising claim of *Blakely* error construed as motion to file supplemental, denied based upon rule forbidding parties from raising new issues by supplemental briefs.); *U.S. v. Curtis*, 380 F.3d 1308, 1310 (11th Cir. 2004) ("This rule does not apply differently in a case, such as this, where the motion is to file a supplemental brief raising an issue for the first time *prior to* a decision on the merits of the direct appeal. We have so held in the context of an *Apprendi*-based claim raised for the first time in supplemental briefing prior to the decision on the merits."); *U.S. v. Dockery*, 401 F.3d 1261 (11th Cir. 2005) (Remand by Supreme Court to reconsider case in light of *Booker* did not require Court of Appeals to treat case as though constitutional challenge to sentence had been timely raised before it, and thus did not preclude Court of Appeals from considering issue to have been abandoned.)

[3] According to the United States Sentencing Commission, "2002 Source Book of Federal Sentencing Statistics." 97.1 of all criminal cases were resolved without jury trial and with a waiver of his or her Sixth Amendment rights.

Now, notwithstanding the eloquent statements of this Court "to resolve all cases before us on direct review in light of our best understanding of governing constitutional principles, *Mackey v. United States*, 401 U.S. 667, 679 (1971) (separate opinion of Harlan, J.) and "to do justice to each litigant on the merits of his own case," *Desist v. United States*, 394 U.S. 244, 259 (1969) (Harlan, J, dissenting), the government argues that the new constitutional rule announced in *Booker* and *Blakely* should not apply to Nuñez.

The Eleventh Circuit's internal rules for how and whether an issue can be raised on appeal cannot override the concerns about fundamental fairness and the integrity of judicial review that this Court identifies in *Griffith*. If the "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication," 479 U.S. at 322, that failure violates constitutional norms as much in the case of a defendant who failed to raise a new rule of criminal procedure that was not available when he filed his initial appellate brief as it would in the case of a defendant who did anticipate the new rule.

There is no basis in *Griffith* or elsewhere to conclude that the decision applies only to defendants who have preserved their constitutional challenges, whether during trial, throughout direct review, or both. The *Griffith* Court granted *certiorari* to answer the question "whether the ruling in *Batson* applies retroactively to a state conviction pending on direct review at the time of the *Batson* decision." *Griffith*, 479 U.S. at 318. *Griffith* neither posed nor answered the more limited question of whether *Batson* applies retroactively only to a defendant who has preserved his objection to a prosecutor's peremptory challenges. Rather, summarizing its prior case law, the Court observed that in a number of separate opinions since *Linkletter v. Walker*, 381 U.S. 618, 622, n. 5 (1965) various Members of the Court have asserted that, at a minimum, *all defendants whose cases were still pending on direct appeal* at the time of the law-changing decision should be entitled to invoke the new rule. *Griffith*, 479 U.S. at 322 (quoting *United States v. Johnson*, 457 U.S.

537, 545 and n. 9 (1982) (Harlan, J.) (internal quotations omitted) (emphasis added)). The Court distinguished not between defendants who preserved their *Batson* objections and those who failed to, but rather between "cases that have become final and those that have not." *Griffith*, 479 U.S. at 322. The *Griffith* Court went on to hold that " . . . the integrity of judicial review requires that we apply that rule to *all similar cases pending on direct review.*" *Id.* at 322-23 (emphasis added). It is particularly enlightening to review the Eleventh Circuit's extraordinarily myopic perspective of how to treat Supreme Court landscape changing decisions with similar opinions from the other circuits. *See* n. 1, *supra*.

II. *Sanchez* Foreclosed Nuñez's *Booker* Claim.

Petitioner recognizes the issue of waiver and abandonment. These concepts should not apply here. Because the uniform precedent of the Courts of Appeals precluded application of *Apprendi* to the Federal Sentencing Guidelines, there was no waiver or abandonment of a cognizable error. Neither Defendant nor counsel should raise meritless issues in light of current precedent simply to prospectively preserve the claim. *See Johnson v. United States*, 520 U.S. 461, 478 (1997);[4] *United States v. Levy*, 391 F.3d at 1356 (Tjoflat dissenting) ("it seems that the Supreme Court has rejected the reasoning that underlies the panel's position and found that it is neither just nor efficient to expect a defendant to raise objections even where "near-uniform precedent" of the Supreme Court and the Courts of Appeals forecloses those objections. As noted earlier, prior to *Blakely*, this and every other circuit court in the nation had held that *Apprendi* does not apply to the Federal Guidelines.").

Should appellate counsel file a brief and claim on anything that passes the "laugh test" regardless of whether it has been squarely foreclosed by precedent?

---

[4] The prosecution's supplemental brief recognizes that *Johnson* requires the rule of *U.S. v. Gaudin*, 515 U.S. 506 (1995), to apply retroactively but subject to review only for plain error. Supplemental Brief, p. 8, n. 2.

Does it matter that the Eleventh Circuit, along with every other appellate court in the nation, held that *Apprendi* did not apply to the Federal Sentencing Guidelines. *See United States v. Sanchez*, 269 F.3d 1250, 1262 (11th Cir. 2001) ("*Apprendi* does not apply to judge-made determinations pursuant to the Sentencing Guidelines"); *United States v. Nealy*, 232 F.3d 825, 829 n. 3 (11th Cir. 2000) ("The Sentencing Guidelines are not subject to the *Apprendi* rule."); *United States v. Harris*, 244 F.3d 828, 829-30 (11th Cir. 2001) (holding that *Apprendi* does not apply to the relevant conduct provision of the Sentencing Guidelines); and *United States v. Diaz*, 248 F.3d 1065, 1105 (11th Cir. 2001) (noting that "Sentencing Guideline issues are not subject to the *Apprendi* rule and, thus, there is no requirement that sentencing facts be submitted to a jury and found beyond a reasonable doubt"). Accordingly, how can the Solicitor General fairly argue that Nuñez "waived" or "abandoned" an issue that was already decided?[5]

If Nuñez could not have fairly raised *Apprendi* in his initial appellate brief, in accordance with governing case law, why should he not be able to do so after this Court addressed the issue while still on direct review? *See Blakely*, 124 S. Ct. at 2548-49, 2562.[6] (Justices O'Connor and Breyer in their dissent, emphasize the dramatic novelty of the decision and its potential to reshape the nation's criminal law system.)

By requiring defendants to raise foreclosed issues over and over again, no matter how unambiguously the Circuit has already decided those issues, *Levy* gives criminal defendants an incentive to flood the federal courts with countless claims that are clearly foreclosed by current precedent, just as Levy's *Apprendi* claim was clearly foreclosed by *Sanchez*. The district and circuit courts (and

---

[5] The unanimous agreement of the circuits on this point is documented in Justice O'Connor's dissenting opinion in *Blakely*. *See Blakely v. Washington*, 124 S. Ct. 2531 n. 1 (2004).

[6] The Eleventh Circuit in *U.S. v. Reese*, 382 F.3d 1308 (11th Cir. 2004), ruled that *Blakely* does not apply to the Federal Guidelines.

this Court) will then be forced to address those claims over and over again. This is not a very effective way of conserving scarce judicial resources.

Moreover, the Supreme Court has rejected – albeit in a different context (that of plain error) – the Eleventh Circuit's view that defendants should be forced to raise objections that are clearly without merit in light of current precedent, simply in order to be able to preserve their claims on appeal. *Johnson*, 520 U.S. at 467-68. Thus, it seems that the Supreme Court has rejected the reasoning that underlies *Levy's* position finding it is neither just nor efficient to expect a defendant to raise objections even where "near-uniform precedent" of the Supreme Court and the Courts of Appeals foreclose those objections.

III. The Procedural/Prudential Bar Rule Cannot Override *Griffith*.

Booker involves a new rule of criminal procedure that the Supreme Court announced *after* the Defendant filed his initial appellate brief. Contrary to all other circuits, the Eleventh Circuit concludes that even supplemental briefs can be authorized "only when intervening decisions or new developments arise after the moving party's brief has been filed *and only when that new authority relates to an issue or issues already properly raised in the party's initial brief.*" *United States v. Levy*, 379 F.3d 1241, 1243 (11th Cir. 2004) (summarizing *Nealy*, 232 F.3d at 830) (emphasis added).[7]

---

[7] The prosecution claims, without merit, the Eleventh Circuit's "default" rule does not conflict with other circuits. The suggestion there should not be uniform application of *Booker/Blakely* remands does violence to *Griffith v. Kentucky* as well as *Booker*, itself. The suggestion that intervening decisions of this Court of such momentous nature as *Booker* and *Blakely* should be ignored in the direct review process by local rule would require this Court to ignore the substance of the new federal sentencing landscape as well as thirty-five years of its precedent from *Mackey v. U.S.* through *Schriro v. Summerlin*. *See* n. 1, *supra* and *Levy*, 391 F.3d at 1345-47, n. 15-16.

The Eleventh Circuit's prudential bar rule of *Nealy/Ardley/Levy,* is subject to countervailing legal and institutional norms. The Eleventh Circuit's issue-abandonment rule – a rule that effectively overrides Fed. R. Crim. P. 52(b)'s plain error rule by barring any review of issues not included in the initial brief – cannot be sustained in light of this Court's prior decisions.[8] Similarly, reliance upon Fed. R. App. P. 28(a)(5) would raise a serious constitutional problem, since it would conflict with the absolute rule of retroactivity that the Supreme Court announced in *Griffith.* To avoid a constitutional conflict with *Griffith*, Fed. R. App. P. 28(a)(5) should be read to exclude issues ***that are raised by a new rule of criminal procedure announced after a defendant has filed his initial appellate brief.*** *See, Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) ("where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.").

Comparable issues were debated in *United States v. Ardley*, 273 F.3d 991 (11th Cir. 2001), *Ardley* applied the procedural bar rule to an *Apprendi* claim even after the Supreme Court remanded with instructions to reconsider a prior panel opinion in light of *Apprendi.* But the defendant in *Ardley* had available to him at the time of his initial brief a "general argument" that was subsequently

---

[8] *See U.S. v. Atkinson*, 297 U.S. 157 (1936) (holding that plain error doctrine applies to issues not raised on appeal); *Thomas v. Arn*, 474 U.S. 140, 148 (1985) (court of appeals' rules of practice may not contravene federal rules or restrict statutorily-mandated jurisdiction; "Even a sensible and efficient use of the supervisory power, however, is **invalid** if it conflicts with constitutional or statutory provisions. A contrary result would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing."; "We need not decide at this time what standards the courts of appeals must apply in considering exceptions to their waiver rules.") (emphasis added) (internal quotation omitted).

elevated into a new rule of criminal procedure by the Supreme Court. As already noted, at the time of his initial brief Nuñez had no such "general argument" available to him because the Eleventh Circuit's decision in *Sanchez* had taken away his ability to invoke *Apprendi* to challenge the application of the Federal Sentencing Guidelines.

CONCLUSION

The writ application requests, "remand to the United States Court of Appeals for the Eleventh Circuit ***with instructions that resentencing be ordered consistent with United States v. Booker***. . . ." Petition for Writ of *Certiorari*, p. 24. (Bold and italics added).

The Eleventh Circuit makes the futility of generic GVR orders clear, having held, post-*Booker*, that it will not retreat from its issue-waiver rule even upon remand "for further consideration in light of *Booker*." *United States v. Dockery*, 401 F.3d 1261, 1262 (11th Cir. 2005). Therefore, specific direction is required in the GVR. Otherwise, a GVR order will precipitate a second round of certiorari petitions in this and like cases in the Eleventh Circuit. Nuñez respectfully invites the following ruling as an alternative,

> The petition for writ of certiorari to the Eleventh Circuit is granted. The case is remanded to the Eleventh Circuit to conduct plain error review of the legality of petitioner's sentence in light of *United States v. Booker*, 125 S. Ct. 738 (2005).

Respectfully submitted,

NEIL M. SCHUSTER
NEIL M. SCHUSTER, P.A.
555 N.E. 15 Street, Suite 2C
Miami, FL 33132
Tel: (305) 416-0324 /
Fax: (305) 416-0325
Email: nmschus@bellsouth.net
Florida Bar No. 216909
Attorney for Petitioner